Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

October Term 2006

GARY VICTOR DUBIN,

Petitioner,

vs.

MANUEL L. REAL, individually; THE INTERNAL REVENUE SERVICE; THE UNITED STATES OF AMERICA; LESLIE E. OSBORNE, JR., individually; JOHN F. PEYTON, JR., individually; CHARLES BANFE, individually; DAVID ALAN EZRA, individually; BANK OF HAWAII; JOHN CANDON, individually; WALTER A. Y. H. CHINN, as Clerk of the United States District Court for the District of Hawaii; and THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner

QUESTION PRESENTED

Are federal judges and federal prosecutors absolutely immune from private independent causes of action seeking, as a last resort, the collateral exercise of inherent judicial authority to remedy documented fraud upon a federal court, notwithstanding the Due Process and Good Behavior Clauses of the United States Constitution and the decision of this Court in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)?

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I. JURISDICTIONAL STATEMENT

The federal question jurisdiction of the district court below was based upon Section 1331 of Title 28 of the United States Code. This Court has jurisdiction to review this Petition, timely filed by express delivery on December 11, 2006, within ninety days (last Sunday excluded) of the denial of rehearing by the court of appeals on September 11, 2006, pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(a), 13.3, and 29.4(a).

II. AUTHORITATIVE PROVISIONS

The court of appeals' June 29, 2006, unpublished memorandum decision and its September 11, 2006, unpublished order, the district court's June 28, 2004, unpublished memorandum decision, and the relevant text of the Due Process Clause of the Fifth Amendment and the Good Behavior Clause of Section 1 of Article III of the United States Constitution are set forth in the Appendix.

III. STATEMENT OF THE CASE

There is a crisis of judicial unaccountability in the Ninth Circuit today that only this Court has the power to correct, and Petitioner's case uniquely presents this Court with an extraordinary opportunity to do so, and at the same time to do justice in Petitioner's individual case.

A. Factual Background

Since Petitioner's complaint was dismissed for failure to state a cognizable claim, and that dismissal subsequently affirmed on appeal, again "for failure to state a claim" -- notwithstanding Petitioner's panel's concluding expression of sympathy ("Dubin's impassioned plea in this case does not fall on deaf ears") -- the facts as pled, summarized below, were all procedurally assumed to be true.

In the early 1990s, the United States Justice Department, concluding that too many attorneys were becoming delinquent in filing tax returns, decided to wage an aggressive, publicized campaign, seeking to criminally prosecute and to make a public example of one attorney in

each State for f[illegible]g to file federal income tax returns.

Petitioner at the time was in the IRS offices in Honolulu being audited for earlier tax years, and became the Justice Department's Hawaii target, just as Petitioner's young son had become ill and subsequently passed away, as a result of which Petitioner was understandably unable to respond to the IRS Examiner's requests for further tax documentation, which was when the IRS Criminal Investigation Division targeted Petitioner for prosecution.

B. Petitioner's Criminal Trial

On August 13, 1993, Petitioner was charged by the U.S. Attorney's Office in Honolulu in a criminal complaint with three failure-to-file misdemeanors covering the tax years 1986, 1987, and 1988, although Petitioner was in the IRS offices at that time being audited for those very years and his tax records had already been given to the examiner.

The Government, consistent with its determined campaign to hang attorneys in public, immediately issued a press release to the media when Petitioner was arraigned on August 27, 1993, erroneously stating that the Petitioner had been indicted by a federal grand jury for, in effect, felony tax evasion, which immediately ruined Petitioner's law practice and his financial ability to pay for his defense -- the Government later merely politely apologizing to the district court for its regretful "mistake," after having been earlier unable to convince a grand jury to indict the Petitioner according to the Magistrate Judge assigned to the case.

Petitioner was then bench-tried in 1995 by the Honorable Manuel L. Real, visiting in the District of Hawaii at the time, who hand-picked Petitioner's case off the criminal calendar on the eve of trial, taking the trial away from a Magistrate Judge that the Petitioner and the Government had agreed upon at arraignment as their presiding judge, Petitioner having waived a jury in reliance thereon, and convicted Petitioner of three willful failure-to-file misdemeanors for having allegedly had $1,497,617.30 in reportable income for the years 1986, 1987, and 1988.

Judge Real sentenced Petitioner consecutively to thirty months imprisonment, enhancing Petitioner's sentence for having supposedly checked himself into the hospital on the eve of trial to escape Judge Real, something that apparently Judge Real was used to experiencing in his District, and fined Petitioner $125,000.00 (plus the costs of prosecution), which supposedly represented the amount of taxes the Government had lost due to Petitioner's alleged willful failure to file -- that amount determining the length of Petitioner's sentence under the then sentencing guidelines.

Petitioner spent nineteen and one-half months in federal prisons in California thereafter, lost all of his clients, lost all of his life savings, and returned to Honolulu on October 1, 1996, to a half-way house and later to home confinement, finding his house in foreclosure, his identify stolen by thieves, and all of his personal property gone.

C. Petitioner's Defenses

Throughout that ordeal, the Petitioner consistently maintained his innocence, complaining; for instance:

1. Petitioner had relied in good faith upon IRS forms and instructions, leading him to believe that he could delay filing income tax returns when he had no net income, as in the three years in question.

2. Petitioner had relied in good faith upon written advice from the IRS Fresno Office, who had earlier questioned him about his delayed filings in those years, and who informed him that as a result of business losses he had "no filing requirement," and who "apologized for any inconvenience" caused in questioning Petitioner about it.

3. Petitioner was admitted to the hospital on the eve of trial by a physician, yet – after trial and before sentencing – Petitioner learned for the first time from the Probation Department's Presentencing Report that just before trial the prosecutors had secretly, behind his back, informed Judge Real, *ex parte*, that he supposedly had been faking illness to avoid Judge Real and was being discharged from the hospital, all of which was untrue, causing Judge Real to

order him arrested and brought to trial in handcuffs in his hospital gown.

4. As a result of that *ex parte* communication, Judge Real scoffed at the Petitioner throughout trial, bench-trying Petitioner without his case or tax files, without access to his attorney or witnesses, while being locked up during trial recesses and overnight at a state maximum security prison.

5. At sentencing as well, Judge Real refused to allow the Petitioner to introduce his tax records into evidence, even for the purpose of mitigating the length of his sentence in order to dispute the Government's claimed "tax loss."

6. Upon sentencing, Judge Real filed findings of fact that were in most respects completely false, factually contrary to the actual trial record itself, which Petitioner has subsequently fully documented.

Naively, Petitioner, trained in and respectful of the law, assumed that the court of appeals would free him, given Judge Real's reputation for volatility, lack of judicial honesty, and the absolutely bizarre nature of his trial record.

D. Petitioner's 1995 Direct Appeal

Petitioner's first, direct appeal in Case No. 95-10040, was decided on December 22, 1995, delivered to Petitioner at a Christmas prison mail call, after the entry of an unpublished Memorandum opinion written by Judge Poole just before he took senior status -- Petitioner's three-judge panel consisting additionally of Judge B. Fletcher and Judge O'Scannlain, which surprisingly affirmed Petitioner's conviction (77 F.3d 490, 1995 WL 764141), concluding that "Dubin obstructed justice by checking himself into a hospital on the eve of trial," and finding "Dubin's remaining contentions are utterly meritless and warrant no discussion."

The contents of Judge Poole's Memorandum, however, bears little resemblance or fidelity to either the underlying facts or the applicable law, which is readily evident to anyone who will take the time to read that document and compare it to the actual trial transcripts.

For instance, in one part of Judge Poole's Memorandum, confronted with the fact that there was evidence in the record Petitioner relied upon explicit IRS written advice, Judge Poole states that Judge Real "apparently weighed this evidence," when in fact the record shows the very opposite, that Judge Real ignored that evidence entirely, stating instead that Petitioner was "enough of a lawyer that knows there's no estoppel against the government by reason of what some employees might do or don't do, okay," when the issue was not estoppel, but good faith belief, a distinction emphasized, for instance, by this Court in the last failure-to-file case decided by it, Cheek v. United States, 498 U.S. 192, 199 (1991):

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. In *United States v. Murdock*, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), the Court recognized that:
>
> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *Id.*, at 396, 54 S.Ct., at 226.

It was well known to the Ninth Circuit Bar at that time that Judge Poole, unquestionably one of the brightest and most well liked federal judges in his time, was unfortunately suffering from severe age infirmities.

While Petitioner was first incarcerated at Boron Federal Prison Camp awaiting a decision on his direct appeal, he was contacted by Judge Poole's office manager, who Petitioner had not previously known, warning Petitioner that he should complain to then Chief Judge Wallace since Judge Poole had been assigned to write the opinion in his case and, according to her, he was in an advanced stage of senility, stating she had had lunch recently with Chief Judge Wallace, who had informed her that they would have to initiate proceedings against Judge Poole unless he took senior status by the end of the year – which he did, right after filing the affirmance in Petitioner's direct appeal.

Petitioner found himself in the uncomfortable position of being forced to protect his reputation and his livelihood by questioning the mental acuity of Judge Poole thereafter, which undoubtedly did not endear him to other Ninth Circuit Judges, seemingly preferring to protect their "judicial independence" instead, at the expense in this instance of the due process rights of criminal defendants.

Petitioner filed a Petition for Writ of Certiorari in this Court, written in his prison cell, which this Court denied in 1996 (Case No. 96-232, 519 U.S. 872).

E. Petitioner's 1997 Collateral Appeal

Immediately upon returning to Honolulu following his incarceration, Petitioner was contacted by a Hawaii attorney living on the Mainland, the person Judge Real claims in his Finding No. 11 who supposedly gave Petitioner his files "the morning of trial," who provided a sworn Declaration to Petitioner that Judge Real's finding was utterly false, that he never gave Petitioner those files; whereupon Petitioner filed a motion for a new trial, which was heard by Judge Real over Petitioner's objection, and he

ignored all of that self-incriminating evidence against him.

Petitioner then appealed Judge Real's decision, and the court of appeals on December 10, 1997, in Case No. 97-10161, by unpublished, unsigned Memorandum, matter-of-factly affirmed Judge Real – the panel consisting of Judges Browning, Pregerson, and Hawkins, refusing to believe Petitioner's new evidence that he was bench-tried without his case or tax files, even though those facts are plainly evident throughout the trial transcripts, finding instead that Judge Real did not abuse his discretion in passing upon his own conduct (133 F.3d 929, 1998 WL 4734).

Petitioner once again filed a Petition for a Writ of Certiorari in this Court, which this Court denied in 1999 (Case No. 98-52, 525 U.S. 870).

F. Petitioner's 2000 Sanctions Appeal

Upon returning to Honolulu and resuming his law practice, Petitioner, a controversial consumer rights attorney specializing in lender liability actions, who therefore has hardly endeared himself to banking institutions, next found himself in a civil case unfairly subjected to an extraordinarily high $116,862.32 Rule 11 sanction by Hawaii District Judge Ezra, who Petitioner had once sued for malpractice for a client of his, and who Petitioner had been told by Judge Poole's office manager had interfered in Petitioner's 1995 direct appeal of his criminal conviction.

Nevertheless, Judge Ezra refused to disqualify himself, grimacing and yelling at Petitioner in court.

In issuing Rule 11 sanctions, Judge Ezra over and over again castigated Petitioner on the record for always portraying himself "as a victim" -- obviously referring to and judging Petitioner prejudicially as a result of his criminal convictions for having supposedly failed to file federal income tax returns and for alleged conduct occurring in other cases outside his courtroom and outside his jurisdiction, as to which he admittedly however had no personal knowledge.

The sanctions were appealed to the court of appeals

in Case No. 00-15202 (consolidated with Case No. 00-15157), and were affirmed, once again in an unpublished Memorandum, which completely misconstrued the actual record below, ignoring, for instance, among other exculpatory facts, that Petitioner's clients during the "safe harbor" period had agreed to a dismissal without prejudice as to all Defendants, but Petitioner's clients refused to agree to a dismissal with prejudice, thereby tying Petitioner's hands.

Petitioner's panel, consisting of Judge O'Scannlain once again (who served on the panel deciding Petitioner's 1995 direct appeal of his criminal convictions, *supra*, yet who nevertheless refused to recuse himself), and Judges Thompson and Berzon, all matter-of-factly affirming the $116,862.32 sanction award, whose reasoning was completely contradictory to the actual record of the case.

Petitioner once again filed a Petition for a Writ of Certiorari in this Court, which this Court denied in 2002 (Case No. 02-317, 537 U.S. 1001).

G. Petitioner's 2003 Judicial Misconduct Complaint

Next, Petitioner complained to a law school classmate of his, a Member of the United States Senate, who suggested that Petitioner file a judicial misconduct complaint against Judges Real and Ezra, since he and his colleagues, concerned about misconduct in the Judicial Branch, had recently passed legislation intended to make federal judges more accountable (Section 351, et seq. of Title 28).

On July 13, 2003, Petitioner filed a detailed, Section 351 judicial misconduct complaint against Judges Real and Ezra, accompanied by more than 5,000 pages of documentation, with the names of hundreds of witnesses, which Chief Judge Schroeder, without explanation, assigned for decision instead to Judge Pregerson, a colleague of Judge Real in the Central District of California and who sat on the panel denying Petitioner's 1997 collateral appeal, *supra* (Case No. 03-89100). The result of course was predictable.

Judge Pregerson rejected Petitioner's Section 351 complaint on two grounds, that Petitioner had supposedly

failed to identify any witnesses and since his complaint arose out of cases before those same judges he therefore had to dismiss the complaint supposedly pursuant to Rule 4(c) of the Rules of the Judicial Council of the Ninth Circuit.

Whereupon, Petitioner appealed to the Ninth Circuit Judicial Council pursuant to Section 352(c), on the basis that Petitioner had not only supplied the names of hundreds of witnesses to Judge Pregerson, but that Section 352(b), as he had been advised by one United States Senator passing that very legislation, had changed the standard of review from "shall" dismiss to "may" dismiss where a complaint relates to the merits of a case.

Nevertheless, on April 8, 2004, the Ninth Circuit Judicial Council, consisting of Circuit Judges Kozinski, Kleinfeld, and W. Fletcher, and District Judges Patel, Coughenour, Levi, and Shanstrom -- Circuit Judges Alarcon and Tashima, and District Judge Ezra not participating (Judge Ezra meanwhile, unknown to Petitioner, sitting at the same time in judgment on Judge Real in another misconduct case, in Canter, Case No. 03-89037) -- found "no basis for overturning the order of dismissal . . . for the reasons stated by Judge Pregerson, and based upon the controlling authority cited in support thereof."

Yet, the panel, demonstrating still more inconsistency and questionable objectivity, thereafter belatedly entered an order changing the language of its Rule 4(c) to "may" dismiss instead, to conform to the 2002 revised requirements of Section 352(b), *supra*, without applying the correct standard to the Petitioner's judicial complaint.

Equally disturbing was the fact that the Petitioner, due to the following language contained in Section 352(c), was prevented from further appealing to the court of appeals or to this Court, Congress for no apparent reason even restricting the appellate jurisdiction of the Supreme Court:

> A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit

> for review thereof. A denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

H. Petitioner's 2003 Fraud-Upon-The-Court Complaint

Meanwhile, despite the refusal of the court of appeals to seriously consider any of Petitioner's appeals, and this Court's denials of *certiorari* review, *supra*, four events occurred which collectively, in effect, informally cleared Petitioner of any wrongdoing whatsoever, notwithstanding having secured no remedial relief from the federal judiciary.

1. After a three-year investigation by the Hawaii disciplinary authorities, Petitioner was found to have been railroaded by Judge Real, and became probably the first attorney in American history cleared of any professional wrongdoing despite three federal failure-to-file convictions.

2. Petitioner, also a Member of the California Bar, whose State Supreme Court has mandated an automatic three-year suspension in such cases, after a four-year investigation had his discipline nevertheless converted by a similarly sympathetic settlement judge of the California State Bar Court into a bare minimum public reprimand, which when published in that State's *Bar Journal* read more like a criticism of the IRS than of Petitioner's conduct.

3. The physician who, according to Petitioner's prosecutors, had told them that Petitioner had checked himself into the hospital, had been faking his illness, and was being discharged from the hospital, which information they then relayed *ex parte* to and was secretly accepted by Judge Real just prior to the start of his 1994 trial, gave Petitioner a sworn Declaration stating that he told the prosecutors no such thing, that Petitioner did not and could not check himself into the hospital, and that the prosecutors attempted to intimidate and frighten the doctor into saying otherwise.

4. After an extensive tax audit of all three years in question conducted by the IRS Seattle District Office following Petitioner's return from prison, which audit was

first refused by the District Office and then granted to Petitioner as a result of the intervention of Hawaii's Congressional Delegation, the IRS subsequently apologized to Petitioner, concluding that for those three years, rather than owing the IRS anything, Petitioner -- as he had continually argued and would have proven had he been allowed by Judge Real to have had his tax files at his trial and at his sentencing – actually had *no income* during any of those years as a result of business losses and was actually owed nearly $100,000, including interest, by the Government due to carrybacks to prior years when income taxes had been paid by him.

Consequently, the IRS paid Petitioner nearly a six-figure refund for those three years during which, contrary to his sentence of 30 months based according to Judge Real on a tax loss to the Government of supposedly hundreds of thousands of dollars, there was not one penny of tax loss.

However, when Petitioner petitioned the IRS Seattle District Appeals Office, seeking reimbursement in the form of a requested tax credit against income tax liabilities for subsequent years, for the $125,000.00 "tax loss" fine levied against him by Judge Real (which with interest would now exceed $250,000), his reimbursement request was denied, the IRS concluding that it had no "jurisdiction" to be able to return the money since "the penalty went to the court and not to IRS," and that that would "have to be done by the court, presumably through an appeal. You will have to contact the court system and pursue adjustment, refund or relief there" (appeals office letter, dated June 5, 2006, a part of the appellate record below).

I. Petitioner's 2004 Fraud-Upon-The-Court Appeal

Having been incarcerated while various statutes of limitations expired, and due to the delay before the IRS District Office audit was permitted Petitioner and concluded, and since any attempt to reopen Petitioner's criminal case would only have resulted in further waste of time, being heard by Judge Real, and since the court of appeals had apparently grown tired of Petitioner and had entered and

order instructing the Clerk to file no more papers in Petitioner's 1995 direct appeal, preventing Petitioner from seeking to recall the mandate, and because no appeal was allowed from a Section 352 denial, Petitioner decided, as his only remaining option short of petitioning Congress for relief, to file a new, independent action for fraud on the Court committed by Judges Real and Ezra and by his prosecutors.

Petitioner, as a last resort, thus sought affirmative relief in district court in 2003, questioning whether the Due Process Clause of the Fifth Amendment and the Good Behavior Clause of Article III, Section 1, of the United States Constitution were superior to or subservient to judge-made doctrines of judicial immunity, citing as precedent the decision of this Court in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), recognizing the inherent power of federal courts to grant relief against fraud upon the Court, especially when committed by officers of the Court, as explained by Justice Black in circumstances where there has been a deliberate fabrication of evidence, as here:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Petitioner's fraud-on-the-court complaint was filed on February 10, 2003, and Petitioner's motion to set aside his convictions, for reimbursement, and for sanctions was

filed on November 11, 2003.

The entire local district court bench recused itself, and Chief Judge Schroeder without explanation appointed Judge Aspen from the Northern District of Illinois to preside over Petitioner's new action.

Judge Aspen proceeded cavalierly to dismiss Petitioner's case on the basis of judicial immunity before any discovery was even permitted, referring in his final written Order mostly to files from other cases without even giving Petitioner advance notice or any opportunity to respond, and so did in part Petitioner's merits panel on June 16, 2006, after Petitioner appealed once again to the court of appeals.

Petitioner's panel consisted once again of Judge Pregerson, who sat on the panel that denied Petitioner's 1997 collateral appeal and who rejected Petitioner's judicial misconduct complaint, together with Judge B. Fletcher, who sat on the panel that denied Petitioner's 1995 direct appeal, and Judge Hall.

The stated basis for the panel's decision was that since "Dubin appeals the district court's dismissal of his action for 'fraud upon the court' under Rule 60(b) of the Federal Rules of Civil Procedure . . . [w]e agree with our sister circuits that an action under Rule 60(b) . . . cannot be used to collaterally attack a *criminal* conviction."

IV. LEGAL ARGUMENT

The fundamental flaw in the panel's reasoning is that Petitioner's Complaint and his Appeal were not based upon Rule 60(b) of the Federal Rules of Civil Procedure.

Petitioner's complaint and motion below, and all of Petitioner's appellate briefs, for instance, have never once even mentioned Rule 60(b), but have instead relied expressly and exclusively upon the inherent power of federal courts to grant relief for fraud upon the Court, pursuant to this Court's decision in Hazel-Atlas, *supra*, and upon a federal court's inherent judicial power if not bedrock responsibility to safeguard the integrity of its own institutions of justice.

This Court have long held that not even judges, let alone prosecutors, for instance, have judicial immunity from criminal conduct, including obstruction of justice and falsification of evidence, Ex parte Virginia, 100 U.S. 339 (1880); see also Braatelien v. United States, 147 F.2d 88 (8th Cir. 1945), and McFarland v. State, 109 N.W.2d 397 (Neb. 1961).

Why should Petitioner's case be treated any differently?

The district court below failed to cite a single case squarely holding that courts have no inherent power to hear arguments that fraud had been waged upon the court in connection with a criminal conviction.

To the contrary, it has long been recognized by this Court that courts have "ancillary jurisdiction," United States v. Beggerly, 524 U.S. 38, 40-41 (1998), to hear independent actions for fraud upon the Court, with the Court's jurisdiction considered to be "a continuation of the former suit," quoting approvingly from this Court's earlier decision in Pacific Railroad Co. v. Missouri Pacific Railroad Co., 11 U.S. 505, 522 (1884), without drawing any artificial distinctions between civil and criminal cases.

The related defense of sovereign immunity against such independent actions, also asserted below, for example, has been consistently rejected by federal courts in this decisional context prior to and since Beggerly; see, *e.g.*: Weldon v. United States, 70 F.3d 1, 4 (2nd Cir. 1995) ("under elementary principles of fairness and justice, actions seeking relief from judgments based on alleged fraud upon the court should be treated as continuations of the former action"); Beggerly v. United States, 114 F.3d 484, 487 (5th Cir. 1997), *reversed on other grounds*, 524 U.S. 38 (1998) ("to allow the government to use sovereign immunity as a shield where it previously has invoked the court's jurisdiction and prevailed in an action based upon its misrepresentations, negligence, or mistake would do unacceptable violence to our basic notions of justice; . . . government consent is not required to bring an independent

action"); and Weldon v. United States, 845 F. Supp. 72 (D.C. N.D. N.Y. 1994), *affirmed without opinion*, 952 F.2d 394 (1991), *cert. denied*, 504 U.S. 988 (1992) ("independent actions in equity are derivative of the initial litigation; . . . 'ancillary jurisdiction is sufficiently flexible that the action may be maintained against a person who was not a party to the original action,' including persons who were attorneys in that action," quoting approvingly from Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 70 (2d Cir. 1990), which cited Valerio v. Boise Cascade Corp., 645 F.2d 699, 700 (9th Cir. (per curiam), *cert. denied*, 454 U.S. 1126 (1981)).

Claims of forged evidence, as here, have always been considered especially compelling candidates for such independent actions; see, e.g., Marshall v. Holmes, 141 U.S. 589, 596 (1891), cited approvingly in United States v. Beggerly, 524 U.S. 38, 48 (1998) ("fraudulently obtained judgments" based on forged evidence may be set aside through independent actions).

It is an affront to the integrity of the entire federal judicial process to suggest that federal courts are somehow otherwise powerless to remedy such fraud, especially when it is waged upon the Court itself and hence the entire administration of justice, with false evidence – especially false *ex parte* communications between prosecutor and trial judge just prior to trial, as here.

Such deceit was only further aggravated by the subsequent cover-up, when after trial the district judge, recognizing his mistake, entered false findings of fact to justify what had been done, which has only now come to light in sworn testimony from the licensed physician involved, as well as from the licensed attorney who supposedly brought Petitioner his case and tax files at the very start of trial, but never did.

See, e.g., Hazel-Atlas, *supra*, where an attorney, as did the two federal prosecutors below, participated in the fabrication of trial evidence, there printing an article in a trade journal under the false name of a purported disinterested expert, this Court holding that the fact that even

if the fraud claimant might not have exercised proper diligence and discovered the fraud earlier, was moreover immaterial as the harm was to the legal system itself.

The need for redressing such "fraud upon the court," as Justice Black explained in Hazel-Atlas, 322 U.S. at 246, even overcomes expired statutes of limitations, and that fundamental doctrine is now recognized in every American jurisdiction, in Hawaii, for instance, having been most recently reaffirmed in Matsuura v. E. I. du Pont de Nemours and Co., 102 Haw. 149, 158-159, 73 P.3d 687 (2003):

> This court has stated that, as "a general rule, a collateral attack may not be made upon a judgment or order rendered by a court of competent jurisdiction. If it is only a question of error or irregularity and not of jurisdiction, it cannot be raised on collateral attack." *First Hawaiian Bank v. Weeks*, 70 Haw. 392, 398 722 P.2d 1187, 1191 (1989) (brackets, citations, and internal quotation marks omitted); see also *State v. Grindling*, 96 Hawai`i 402, 31 P.3d 915 (2001); *In re Genesys*, 95 Hawai`i at 37 n.4, 18 P.3d at 899 n.4; *Matson Navigation Co. v. Federal Deposit Ins. Corp.*, 81 Hawai`i 270, 916 P.2d 680 (1996); *Cooper v. Smith*, 70 Haw. 449, 776 P.2d 1178 (1989). However, . . . when there is an allegation of fraud upon the court . . . "This rule does not limit the power of a court to entertain an *independent action* to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." (Emphasis added.) Thus, like the policy favoring the finality of judgments, the policy against collateral attacks on judgments is not absolute and does not favor limiting liability in a collateral proceeding when there is an allegation that fraud was committed in the prior proceeding.

Unlike actions seeking damages as compensation for economic losses due to IRS abuses, for instance, pursuant to Section 7433 of Title 26 of the United States Code, Petitioner here seeks instead to have his misdemeanor convictions set aside, to have the money returned to him that he paid in fines which was miscalculated based upon the supposed lost tax revenue to the Government which in Petitioner's case the Government has now determined in reality was a minus zero, and to have the money returned to him that he paid in Rule 11 sanctions imposed on him as a result of fraud committed upon the Court in addition to the obvious injustice waged against him, in whatever form and in whatever amount deemed just and proper, and not as civil damages *per se*.

Finally, while it is true that the doctrine of *res judicata*, also argued below in support of the argument that fraud upon the court could not be raised to collaterally attack criminal convictions, although not the stated basis of the court of appeals' affirmance, that would be true only where a complaining party had an adequate opportunity to litigate, and could have litigated, that claim at trial in the prior action, and not where a complaining party, as here, "had had no opportunity to litigate the allegations of fraud on the court," the evidence of same having only now surfaced after-the-fact in abundance, culminating in an apology received by Petitioner only relatively recently from the very agency that referred his case to the U.S. Justice Department for criminal prosecution in the first place, Weldon v. United States, 70 F.3d 1, 5 (2nd Cir. 1995).

V. CONCLUSION

This Petition represents the culmination of a thirteen-year-long struggle by this Petitioner, an attorney trained and believing in American Democracy, to secure justice in his own profession and in the Ninth Circuit.

The perceived overall inability of the federal judiciary to police itself has recently brought renewed Congressional criticism, as the Justices of this Court well know, and specifically, in the case of Judge Real, even a

recent Congressional resolution, H.R. 916, calling for his impeachment for alleged misconduct in another case, the facts of which, if true, are even less alarming than those now before this Court in this Petition.

Should this Court again turn another disquieting deaf ear to this Petition, and to Petitioner's renewed plea for justice, some may justifiably, incredibly conclude that the IRS, at least in Petitioner's case, which has now freely admitted that it was wrong, and the Catholic Church, for instance, which no longer tries to cover up the excesses of errant priests by shuffling them back and forth between parishes as some federal circuits by analogy still seem to do, have in contrast more institutional integrity than does our federal judiciary, which appears, especially in Petitioner's case, more willing in the Ninth Circuit at least, to cover up abuses rather than to honestly correct them.

Federal judges should lead by example, and be better known as themselves acting as they hold in their cases that others should do, rather than for doing otherwise in their own institutions of governance that they themselves control.

If this Court denies this Petitioner review now, it surely will be seen -- in the minds of many who are personally familiar with what has increasingly become a well-known case among the Bar -- as even more alarmingly renewing, this time in the context of judicial self-governance, or the lack thereof, what was one of the major, general concerns of its first Chief Justice, who, faced with similar malfunctioning within the institutions of American democracy in his time, warned:

> I fear, and there is no opinion more degrading to the dignity of man, that these have truth on their side who say that man is incapable of governing himself. (Albert J. Beveridge, The Life of John Marshall, Volume I, page 288)

Respectfully submitted,

Honolulu, Hawaii
December 11, 2006

GARY VICTOR DUBIN
Petitioner

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1. Complaint For Fraud Upon The Court, Filed February 10, 2003, In The United States District Court For The District Of Hawaii

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GARY VICTOR DUBIN, Plaintiff, vs. MANUEL L. REAL, individually; THE INTERNAL REVENUE SERVICE; THE UNITED STATES OF AMERICA; LESLIE E. OSBORNE, JR., individually; JOHN F. PEYTON, JR., individually; CHARLES BANFE, individually; DAVID ALAN EZRA, individually; BANK OF HAWAII; JOHN CANDON, individually; WALTER A. Y. H. CHINN, as Clerk of the United States District Court for the District of Hawaii; and THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT, Defendants.	CV. NO. 03-00058 COMPLAINT FOR FRAUD UPON THE COURT; EXHIBITS "A" AND "B"; DEMAND FOR TRIAL BY JURY; SUMMONS

COMPLAINT FOR FRAUD UPON THE COURT

COMES NOW Plaintiff GARY VICTOR DUBIN, and for his Complaint against Defendants MANUEL L. REAL ("Real"), individually; THE INTERNAL REVENUE SERVICE ("IRS"); THE UNITED STATES OF AMERICA ("USA"); LESLIE E. OSBORNE, JR. ("Osborne"), individually; JOHN F. PEYTON, JR. ("Peyton"), individually; CHARLES BANFE ("Banfe"), individually; DAVID ALAN EZRA ("Ezra"), individually; BANK OF HAWAII ("BOH"); JOHN CANDON ("Candon"), individually; WALTER A. Y. H. CHINN ("Chinn"), as Clerk of the United States District Court for the District of Hawaii; and THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT ("Judicial Council"), alleges and avers in this independent action for fraud upon the Court, as follows:

A. Plaintiff Was Wrongfully Convicted Of Three Misdemeanor Tax Convictions

1. Plaintiff, 64, is a Hawaii attorney, a resident of the City and County of Honolulu, and a Member of this Court's Bar, who, with the exception of the events described herein, has never been found guilty of any personal or professional wrongdoing throughout his forty-year legal career, first as a law professor, and then as a practicing trial attorney.

2. On August 27, 1993, on Plaintiff's 55th birthday, United States Assistant Attorney Osborne, also a resident of the City and County of Honolulu, and the IRS issued a Press Release, carried as a front-page media event throughout all of Hawaii, announcing that Plaintiff had been indicted by a Federal Grand Jury for failing to file federal income tax returns for the years 1986, 1987, and 1988, when his combined "income" was said to have been for all three of those years $1,643,900.00 ($530,511.00 in 1986, $634,100.00 in 1987, and $479,289.00 in 1988).

3. Plaintiff was charged under Section 7203 of Title 26 of the United States Code (IRS Code), with the "willful failure to file return, supply information, or pay tax": "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or

supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution."

4. On September 13, 1994, the day of trial, Plaintiff was hospitalized at Queen's Medical Center ("Hospital"), within blocks of the Honolulu Federal Court House, and, found to have been faking his illness by Visiting California Central District Judge Manuel L. Real, a resident of the State of California sitting temporarily in the District of Hawaii, Real had Plaintiff arrested while in his Hospital gown and forcibly brought to trial in handcuffs by two burly U.S. Marshals.

5. Subsequently, following a one and one-half day non-jury trial held on September 13 and 14, 1994, in United States v. Dubin, Cr. No. 93-1434-MLR, in this Court, during which time Plaintiff was jailed, Real found Plaintiff guilty of three failure-to-file misdemeanors, pursuant to Section 7203 of Title 26 of the United States Code, for having failed to file federal income tax returns for the years 1986, 1987, and 1988, when Real determined Plaintiff's combined "gross business income" for all three of those years to have been $1,497,617.30 ($533,725.39 in 1986, $633,594.38 in 1987, and $330,297.68 in 1988), and Plaintiff's combined "taxable income" for all three of those years to have been $518,744.59 ($199,980.29 in 1986, $284,787.75 in 1987, and $33,976.54 in 1998).

6. The IRS investigation of the Plaintiff was conducted by Special Agent Banfe of the Honolulu Office of the Criminal Investigation Division of the IRS, at the time a resident of the City and County of Honolulu, who later was formally honored with a departmental cash award as a result of Plaintiff's successful prosecution.

7. Relying upon the maximum Federal Sentencing

Guidelines, on January 20, 1995, Real sentenced Plaintiff, who had been released on a cash bond of $250,000.00 awaiting sentencing, to a prison term of thirty (30) months, running each of the three misdemeanor sentences consecutively, and one-year of "supervised release" thereafter, and fined Plaintiff $125,000.00, based upon the loss to the Government in tax revenues, plus $6,685.70 for the costs of his prosecution, for a total fine of $131,685.70.

8. Plaintiff, given only days in which to arrange his affairs by Real, sequentially spent a total of nineteen and one-half months, from February 14, 1995, through October 1, 1996, on the U.S. Mainland in three federal prisons in California, at Boron Federal Prison Camp, at Terminal Island Federal Correctional Institution, and at Lompoc Federal Correctional Institution, before returning to Honolulu to a half-way house and then to home confinement, until eventually freed.

9. Initially, as a result of that 1993 Justice Department Press Release, supra, and thereafter as a consequence of Real's late-1994 convictions, Plaintiff lost all of his clients and his entire law practice of thirty years and virtually all of his assets and life savings, notwithstanding Plaintiff's steadfast denial, during every minute of his prosecution, that he had had no taxable income during any of those years.

10. Following Plaintiff's return to Honolulu, the District Office of the Internal Revenue Service on the U.S. Mainland proceeded to audit nearly twenty years of Plaintiff's previous federal income tax returns, including the three years in question (1986, 1987, and 1988), and after an examination that lasted more than six years, the District Office Revenue Agent on December 6, 2002, finally determined that Plaintiff's combined "taxable income" during those three years, according to the IRS, was actually a negative amount, a minus $307,794.00 (a negative $243,645.00 taxable income in 1986, a negative $60,801.00 taxable income in 1987, and a negative $3,348.00 taxable income in 1988), resulting in no taxable income whatsoever

in any of those years, for a "corrected tax liability" of "$0.00," "$0.00," and "$0.00," respectively in each of those three years, according to the IRS' own Mainland District Office's computations only just recently provided to the Plaintiff by facsimile.

11. Additionally, since Plaintiff had paid the IRS approximately $70,000.00 as his tax liability for 1984, since operating losses must be carried back to the three previous years, the IRS Mainland District Office Revenue Agent has also determined that, considering the refunds due Plaintiff (with interest) for the 1984 overcharges, rather than owing the IRS anything for the 1986, 1987, and 1988 tax years, Plaintiff was actually owed more than $100,000.00 by the IRS at the conclusion of those three years for which he was incongruously prosecuted and sentenced by Real for supposedly owing the Government huge tax money.

B. Plaintiff's Convictions Were No Mere Accidental Miscarriages Of Justice

12. Plaintiff's three false failure-to-file misdemeanor convictions were no mere accident; almost eight years of investigation after-the-fact have revealed that they were instead the result of the type of unchecked official abuse of the federal criminal process which it is believed has become widespread in the Ninth Circuit for many years, of which this Plaintiff is but one of its many otherwise unknown victims.

13. Had this Plaintiff, like most such victims, not been an attorney with the professional knowledge, skill, experience, and determination to battle against the system, the true facts behind Plaintiff's false convictions would similarly presumably never be known.

14. An understanding of Plaintiff's now documented mistreatment provides rare and important insight for a constitutional democracy into the otherwise low-visibility institutional corruption that many of those who practice in this District Court frequently witness, but fear to challenge, an insidious and unchecked arrogance that has transformed -- for too many sitting district judges -- the need for judicial

independence through life tenure guaranties, into an out-of-control justification for an autocratic and unaccountable, defensively self-protective federal judiciary. And this Plaintiff is in a position to know.

15. Plaintiff invites his professional colleagues with such knowledge that heretofore have sheepishly preferred to share their thoughts in private conversations, to now speak up, or what happened to Plaintiff might well tomorrow happen to you.

16. For, what befell this Plaintiff was more than a deliberate attempt to personally destroy him and his reputation, but was an attack by corrupt officials upon the independence of the entire Hawaii Bar.

17. What follows is a short, six-point summary of how this Plaintiff was railroaded -- the specific details concerning which are presented in the next section of this Complaint, together with additional clues into an even deeper corruption that threatens individual liberty in this State that goes beyond the limited scope of this pleading.

18. First, Plaintiff's prosecution was not the result of any random investigation of taxpayers hiding from the IRS; the IRS in the early 1990s launched a national project to purposely hang one attorney in every State for failure-to-file, a sort of police state tactic that caused some State Bars to file lawsuits against the IRS, but the news did not reach Hawaii until this Plaintiff had already been fingered, when in its January 1994 issue of the Hawaii Bar Journal the Hawaii State Bar belatedly formally and bluntly warned all Hawaii lawyers that "the IRS is targeting" lawyers for non-filing.

19. Plaintiff was at the time being audited by the IRS for those very same years in question, and had already freely provided the IRS Examiner in Honolulu, Ms. Janet Nakasone, with all of Plaintiff's tax records for 1986, 1987, and for most of 1988, well before the IRS Criminal investigation had even begun; all Banfe had to do, therefore, was to review the very records of gross income and business deductions that the IRS' Honolulu Office already had to

understand that Plaintiff had lost money in each of those three years had Banfe been interested in uncovering the truth.

20. Second, the IRS was either unwilling to attempt to acquire, or unable to get, a federal grand jury to indict Plaintiff, notwithstanding Osborne and Banfe's 1993 Press Release to the contrary, supra, which of course naturally predictably devastated Plaintiff's law practice well in advance of trial; for Plaintiff was to the contrary merely charged by the cavalier filing of a "criminal information" prepared by Osborne himself without any grand jury knowledge or approval whatsoever, and when that false Press Release was called to this Court's attention during pretrial proceedings, Osborne merely apologized for what he termed to be "a mistake".

21. Third, the Plaintiff and the Government on August 27, 1993, at arraignment, had agreed upon trial by Magistrate Judge Barry M. Kurren, whose impartiality and fairness was and remains beyond question, and Plaintiff for that reason had agreed to waive a jury trial, yet that written agreement was abruptly cast aside by this Court when the case was conveniently non-randomly reassigned without explanation on the eve of trial to Real, whose reputation for volatility, dislike of attorneys, and maximum, harsh failure-to-file sentences Plaintiff subsequently learned meant that the outcome of the trial could easily have been predicted no matter the actual nature of the trial evidence.

22. Fourth, throughout the trial proceedings Real continually scolded Plaintiff for having checked himself into the hospital to avoid trial; it was only months later, prior to sentencing, as a result of chance revelations by a Probation Officer, that Plaintiff for the first time learned, later to be admitted in appellate proceedings, that Osborne and Peyton had informed Real in secret ex parte communications through Real's law clerk just prior to the start of trial that Plaintiff, according to Queen's "duty doctor" -- so they said -- had been faking his illness and was being released from the Hospital.

23. Thus, in the Government's Answering Brief before the Ninth Circuit Court of Appeals in Case No. 95-10040, at 26-27, Osborne admits: "the United States Attorney, who prosecuted the case [Osborne], called Queen's medical Hospital and spoke to Doctor Wayne [sic] Wakuzawa, M.D., the defendant's attending physician. Dr. Wakuzawa informed the Assistant United States Attorney [Osborne] that in the doctor's opinion, the defendant did not have any condition which would require his hospitalization. The defendant had no acute medical condition. The defendant was to be discharged from the Medical Wing of the hospital at that point. The fact that Mr. Dubin was being discharged from the hospital was related by the United States [Osborne] to the court clerk."

24. The physician, an emergency room doctor, Dr. Wynn Wakuzawa, who spoke with Osborne that day was not "the duty doctor" and to the contrary, having now admitted to being somewhat more than fearful of IRS retaliation, has finally nevertheless agreed to provide, and on October 8, 2002, has now provided Plaintiff with a sworn declaration that he not only never told Osborne that, but that Osborne knew before speaking with him from a prior conversation that Osborne had had with Plaintiff's actual admitting physician, Dr. Marie-Louise deVegvar, earlier that day, that she was Plaintiff's physician and that she had admitted Plaintiff to the Hospital, not him, and that Plaintiff could not have admitted himself, and indeed no one admit themselves into Queen's or into any other hospital, and that Plaintiff was not being discharged from Queen's, as Osborne and Peyton had falsely reported to Real ex parte, supra, that they had learned supposedly from "the duty doctor," but Plaintiff had in fact been admitted by Dr. deVegvar to Queen's for treatment for at least one to two weeks.

25. As Dr. Wakuzawa has now testified, under oath, in his October 8, 2002, sworn Declaration, p. 4, recently provided to Plaintiff: "At no time that morning did I ever tell anyone that Mr. Dubin had checked himself into the hospital. No one can check himself or herself into the hospital without

a physician ordering an admission."

26. And, as Dr. deVegvar has now similarly testified, under oath, in a December 11, 2002, sworn Declaration of hers, p. 3, similarly provided to Plaintiff: "Mr. Dubin did not and could not admit himself to Queen's. It was my judgment. On the morning of September 13 at 9:30 a.m. I received a phone call from Leslie Osborne, Assistant U.S. Attorney, who wanted to discuss my evaluation and treatment of Mr. Dubin. When I refused to discuss the case with him because of the issue of confidentiality, he stated that he would then issue a subpoena for my appearance in Court. I felt intimidated. I then told him that I had admitted Mr. Dubin to Queen's Hospital that morning for treatment".

27. Fifth, throughout the trial proceedings, having been forcibly taken to trial from his Hospital bed, the Plaintiff continually complained to no avail during trial proceedings on the record that he did not have his tax or his case files with him for his defense -- while additionally without counsel and without any ability to call witnesses in his defense or to do research since Plaintiff was held in a cell during lunch breaks, prevented by two U.S. Marshals from speaking with anyone during trial, and locked up at Halawa State Prison by Real each evening as punishment for checking himself into the Hospital.

28. Although Real stated, and again on the record, at the end of the first and only full day of trial, on September 13, 1994, that Plaintiff's absent files would be brought to him that evening (which they were not), Real nevertheless entered false findings of fact, apparently himself cognizant of such an otherwise obvious due process violation, claiming that an attorney friend of the Plaintiff, a Honolulu attorney now residing on the U.S. Mainland, James Clement, had supposedly brought Plaintiff his files at the start of trial, which attorney Clement in a sworn Declaration has now subsequently flatly denied.

29. Sixth, Plaintiff was ill and had been treated and sedated at the Hospital only minutes before being arrested and being forcibly brought to Real's Courtroom a few blocks

away; nevertheless, Real refused, again on the record, to inquire into Plaintiff's resulting inability, without counsel, to adequately defend himself, yet when it came time to file his findings of fact, Real falsely states that he thoroughly examined Plaintiff's mental and physical health before proceeding with trial.

C. Plaintiff's Convictions Were The Result Of Official Misconduct

30. Real, while visiting in Hawaii to preside over the Marcos multidistrict civil trial, on the eve of Plaintiff's trial handpicked Plaintiff's case from the trial calendar, with his seniority taking the case abruptly away from the assigned Magistrate Judge, Judge Kurren, who was to have presided at Plaintiff's trial by standing local rule and by jury-waived agreement of the parties entered into at arraignment.

31. Real quickly prejudged the case before hearing any witnesses or seeing any evidence, contrary to the Osborne's early arraignment statements on the record, with which Kurren had agreed, that the case was "complicated" although "only a misdemeanor" (Transcript 10/6/93, p. 4; Order 10/6/93), Real starting Plaintiff's trial with the admonition, suggestive of one planning to leave to hop on a plane: "this case is not a complex case, it's failure to file income taxes, that's all. There's no complexity to it at all, it's very, very simple" (Transcript 9/13/94, p. 6).

32. Trial had been set for August 1994, but Plaintiff, representing himself, became ill with chronic back pain in April, which worsened in July, causing Kurren in late August to grant a continuance, based on medical reports, finding the Plaintiff "excusably unprepared": "[F]ailure to grant it would make the continuance of proceedings impossible due to the health of the Defendant, and would deprive the Defendant of counsel of his choice and reasonable time necessary for effective preparation" (Order 8/22/94).

33. Follow-up medical evidence revealed that Plaintiff's back problems were still severe, making it

impossible for him to prepare for trial in September; additionally, Plaintiff's only son, in his senior year at the University of Southern California, just before Plaintiff's arraignment had died of AIDS after struggling for four months in intensive care at Queen's, causing Plaintiff to suffer from recurring bouts of severe depression.

34. Plaintiff sought a brief, one-week continuance in late August in order to retain counsel, but Real, lecturing Kurren, scoffed at Plaintiff's request and at a hearing that lasted less than five minutes refused to grant a further continuance, although counsel, Benjamin Cassiday III, hired to secure a continuance for Plaintiff, told Real that in his professional judgment Plaintiff was ill and "was incompetent to act as his own attorney" (Transcript 9/12/94, p. 2).

35. Plaintiff subsequently consulted with his physician, Dr. deVegvar, who, as his condition worsened, decided on an emergency basis to admit him to the Hospital prior to trial: "I evaluated Mr. Gary Dubin on September 9, 1994 at which time he was feeling depressed and [had] accompanying passive suicidal ideation . . . Mr. Dubin was suffering from Major Depression resulting from his son's death two years ago with increase in depressive symptoms over the past several weeks. . . . [T]he death of a child is one of the most devastating events a human being may experience and it may take years to recover from such a loss. . . . Mr. Dubin did not and could not admit himself. It was my judgment" (Medical Report 12/22/94).

36. Judge Real, told immediately of Petitioner's hospital admission, ordered government doctors to examine Petitioner (Transcript 9/13/94, p. 2).

37. Before government doctors could arrive, Osborne and Peyton, also an Assistant U.S. Attorney and a resident of the City and County of Honolulu, telephoned Dr. deVegvar, who informed them that she was the admitting physician, and they then bullied her into disclosing Plaintiff's medical condition, learning from her that she had admitted him for one to two weeks (Transcript 9/13/94, p. 2).

38. Osborne and Peyton then contacted Dr. Wakuzawa in Queen's Emergency Department, who knew nothing of Petitioner's hospitalization ordered by Dr. deVegvar, only that his department had taken an emergency spine x-ray (Declaration of Dr. Wakuzawa 10/8/02, pp. 3-4).

39. Then Osborne and Peyton, with full knowledge of the actual facts concerning Plaintiff's admission by Dr. deVegvar from their prior telephone conversation with Dr. deVegvar, nevertheless without notice to Plaintiff sent Real a telephone message through his law clerk, Leslie Sai, that morning that Plaintiff was faking his illness and was well and was being discharged from the Hospital (Government's 1995 9th Circuit Answering Brief, p. 27).

40. Upon receiving that false message, Real blew his top, rescinded his examination order, had Plaintiff arrested at the Hospital and brought to trial immediately in handcuffs.

41. Petitioner only learned of that secret ex parte communication three months later, after the trial, when the Probation Department revealed what had happened in Paragraph 24 of its draft Presentencing Report: "According to AUSA Osborne, when he called Queen's Medical Center to make arrangements for the Government to examine the defendant, he was advised by the duty doctor that the defendant was being discharged because he had no physical medical condition that would allow him to remain in the hospital. Subsequent to receiving this information from AUSA Osborne, the Court found [in absentia] that the defendant was physically and mentally fit to participate in the non-jury trial, and immediately issued a no bail warrant [bracketed words supplied]".

42. First, Dr. Wakuzawa was not the Hospital's "duty doctor," and as he later would confirm, he was not even aware that the Plaintiff had been admitted to the Hospital (Transcript 1/9/95, p. 6).

43. Second, Real made no such inquiry into Plaintiff's health whatsoever, welcoming him in handcuffs straight from the Hospital with only "All right . . . you're

here" (Transcript 9/13/94. p. 4). With characteristic inconsistency, seeing Plaintiff, while incarcerated, the following year, Real was more forthright: "You look a lot better than you did before. You sound a lot better" (Transcript 5/10/95, p. 5).

44. Third, Real at the trial openly ignored the fact that the Plaintiff was medically sedated, and even Osborne felt sufficiently concerned himself for the likelihood of reversal on appeal, given Plaintiff's obvious dizzy condition, to bring it to Real's attention: "MR. OSBORNE: Was the Court advised of a problem with medication? THE COURT: Yes, we have no written prescription, or dosage, or anything from the hospital, so I'm not going to get involved in that kind of a situation. We don't know what the medication is about or anything else" (Transcript 9/13/94, p. 26); compare with Queen's September 13, 1994, contemporaneous "Hospital Notes": "Now taking Zoluft and Ativan . . . Cognition-impaired concentration. Patient taken by Marshals from Hospital without being discharged."

45. Fourth, Plaintiff was arrested and confined throughout the trial, yet Real paid no attention to the effect such confinement was having on Petitioner's ability to defend himself, not being allowed to make telephone calls, to contact witnesses, to do research, or even to sleep: "MR. DUBIN: I just don't feel capable of cross-examining . . . . Last night, after I left this court, I had an hour and a half in transportation; about an hour and a half waiting around in a cell while I was strip-searched and processed; another half an hour here before we left; got to my cell, which is a concrete – almost like concrete slab with a light overhead, at about 7:30. Nine o'clock you go to sleep there with a light over your head. Woke up about 6:00. I couldn't sleep under those conditions. . . . THE COURT: Lawyers always work without sleep, Mr. Dubin" (Transcript 9/14/94, pp. 18-19).

46. Fifth, after trial, when, at sentencing, the true medical facts surfaced, Real angrily sought to discredit Plaintiff's admitting physician, Dr. deVegvar, debunking her credibility even before she could testify and even before he

had even seen her face: "THE COURT: [She's] given a report and I've read that report, and I've read the notes and I just don't think she's candid. I think it is made up. Okay? MR. CASSIDAY: Well, Your Honor, I think I should call her to --. THE COURT: Be my Guest" (Transcript 1/13/95, p. 4).

47. Knowing Real's volatile reputation, Osborne and Peyton with their false ex parte report to Real literally spun him around like a toy top. As a result, Real continually harangued at Plaintiff's credibility throughout the trial, prejudging the entire case, over and over again yelling at Plaintiff, for instance: "There was no reason that you went to the hospital except to escape trial" (Transcript 9/13/94. p. 103).

48. And, at sentencing, for that reason, despite all of the medical evidence available to the contrary, Real even enhanced Plaintiff's sentence by several months for supposedly checking himself into the hospital while well (FOF 34).

49. The worst prejudice that resulted from Real's reliance upon such secret ex parte, out-of-court evidence was that -- having been arrested in his Hospital robe and taken directly to Real's courtroom less than a mile away, and incarcerated during recesses and overnight -- Plaintiff had no tax or case files or trial exhibits with him for his defense, nor could he call witnesses or do research.

50. When the prosecutors in the middle of trial themselves felt the need to raise the issue with Judge Real, recognizing the farce of trying a criminal defendant without allowing him access to his files, Judge Real, ordering the trial to nevertheless proceed, tried to downplay the problem: "THE COURT: A pen and paper, Mr. Dubin [Osborne provides a pen and paper]. What we want you to do is write a note authorizing your friend to . . . go get the exhibits which you left at home. . . . MR. DUBIN: Your Honor, can I say on the record that my ability to prepare at all at the trial of this matter would enable me to have access to my records, . . . my office files, hardly the kind of thing that I would

have at a jail lock-up. THE COURT: No, it's a little late for that. . . . No, you had the documents at home and we will get the documents . . . and any notes that you may have on them, and they will be delivered to the detention center so that you can do whatever you want with those documents. . . . All right, sir, would you do that? Would you get that note and get those materials for Mr. Dubin? . . . All right, Mr. Clements" (Transcript 9/13/94, pp. 32-36).

51. When, however, Petitioner still continued to complain about the absent of his files at the conclusion of the first and only full day of the one and one-half day trial, Real showed only punitive disinterest: "THE COURT: 9:00 o'clock tomorrow morning, Mr. Dubin. . . . MR. DUBIN: For me to properly prepare this case I have to have access to a number of files . . . THE COURT: Mr. Clements has gone to your house to get them --. MR. DUBIN: No, that's not in there, Your Honor. THE COURT: -- and he can bring them to wherever the marshals are going to place you and take care of that problem. MR. DUBIN: Your Honor, it's not in that area where I -- . THE COURT: Well, Mr. Dubin, I can't help that. You had – since January you've had all of these records with which to prepare for trial. Again, as I tell you, this is not Burger King" (Transcript 9/13/94, p. 106).

52. Real, four months after trial, upon completing sentencing entered false findings of fact, contradicting what he himself on the record at the trial, supra, had noted had actually to the contrary occurred, seeking to hide by his Finding of Fact No. 11 that he had tried the Plaintiff without his case or tax files: "DUBIN complained that he did not have his records. Those were brought to him during the morning of September 13, 1994, by a friend, also a lawyer, and those records were available to DUBIN throughout the trial. During the trial DUBIN referred to his records and what they contained."

53. Upon Plaintiff's returning in late 1996 to Honolulu after serving time in three Mainland prisons, and after having had limited access to the outside world, Plaintiff was contacted by attorney James Clement, who had been

residing in New York State – the "friend" who Real, supra, on September 13, 1994, during trial had ordered go to Plaintiff's residence and bring him his files for the last few hours of trial the next day – and who had telephoned Plaintiff, having heard he had returned.

54. Clement for the first time gave Plaintiff the details, not previously known to Plaintiff, later included in a sworn Declaration, concerning how he had gone to Plaintiff's residence the afternoon of September 13, 1994, picked up the wrong files, returned to the courtroom at the end of that first day, finding everyone gone, which testimony further contradicts Real: "I currently reside in Ithaca, New York. . . . I returned to Honolulu at the end of the summer in 1994, and I sat as a visitor at Mr. Dubin's tax trial on both days . . . . Judge Real called me to the podium and instructed me to get Mr. Dubin's files for him. . . . I left the courtroom at . . . about 1:30 p.m., went to Mr. Dubin's house, which was . . . forty minutes away, found two boxes of materials that appeared to be related to the tax case, and returned that day after the trial had adjourned, at approximately 5:00 p.m. When I reached the courthouse, Mr. Dubin was gone, apparently taken to Halawa prison for the night. I inquired at the U.S. Marshals' office in the courthouse whether I could bring the case materials to Mr. Dubin, and I was told that I could not since I was not his attorney. I was instructed by the Judge's clerk to leave the case materials with them and that they would give them to Mr. Dubin the next morning for the second [and final one-half] day of trial. . . Only later during trial did I discover from Mr. Dubin that I had brought him only a duplicate set of Government's Exhibits and none of his case or tax files. In preparing this Declaration, I requested copies of various documents from Mr. Dubin. . . . which I have never before seen. In Finding of Fact No. 11, Judge Real states that Mr. Dubin had his records 'brought to him the morning of September 13, 1994 by a friend, also a lawyer, and those records were available to DUBIN throughout the trial.' . . . I know of my own personal firsthand knowledge that Finding of Fact No. 11 is absolutely false."

55. The obvious prejudice resulting from the absence of access to a defendant's files in a criminal tax prosecution should hardly require comment.

56. Plaintiff's defense was based upon the absence of not one but all three elements necessary for a successful Section 7203 prosecution: (a) that he had no duty to file timely returns in 1986-1988 because he had no individual gross income, (b) that he nevertheless did file informational returns which satisfied Section 6011 requirements; and (c) that any failure to file timely returns on his part was in any event not willful, and hence not criminal.

57. Without Plaintiff's complete files, especially his tax records, it was virtually impossible for the Plaintiff to defend himself, although Real did give him the Court's copy of the Government's selective partisan trial exhibits the first day of the one and one-half days of trial, and did allow him to introduce into evidence a few exhibits in the Court's case file, attached to one of Plaintiff's early 1993 pretrial motions, the second and final day of trial (Transcript 9/13/94, p. 15; Transcript 9/14/94, p. 116).

58. Having always prepared his own returns, for instance, and having filed virtually every year of his adult life before this ordeal, Plaintiff had formed the belief from IRS publications that his duty to avoid delaying filing his tax returns as a sole practitioner was based upon his net business income, and not his gross receipts.

59. Like many taxpayers, the Plaintiff had always referred to the IRS' own printed annual "Tax Guide For Small Business" in preparing returns, which had consistently instructed taxpayers – at least until after Plaintiff's trial when the language therein was suddenly changed in 1994 – to subtract costs from business gross when calculating one's individual gross income: "If you are a sole proprietor, figure the net income or loss from your business on Schedule C (Form 1040). If your business has a net loss, it generally can be deducted from other income when figuring your gross income" (1984 IRS Guide).

60. That method of calculating individual gross income was reinforced in Plaintiff's mind by the very structure of Form 1040 historically, which instructed Schedule C taxpayers, and still does, to total individual gross income by adding to wages "business income or loss" (IRS Form 1040).

61. And, Plaintiff's view was further reinforced by the IRS's own Form 1040 "who must file" instructions, requiring filing "if you have net earnings from self-employment income of at least $400."

62. Plaintiff, in fact, had had a history of delaying filing returns in years he had no net earnings; for instance, ten years before being prosecuted Plaintiff had delayed filing his 1982 return until October 15, 1984, reporting to the IRS that his income was "less than the amount required for filing" on its inquiring Form 4901, and why, writing in "self-employed income below amount required for filing (loss)", and was never informed his understanding was in any way wrong.

63. The issue was never whether Plaintiff would file, but only if he would delay filing in years with no net earnings, for he would always file Form 1040s even with losses eventually, to track depreciation, carry forward losses, meet lender requirements -- while always informing the IRS he had had no income in such years on IRS Form 4868, and subsequently on IRS Form 8176 routinely for decades; e.g., for the three years in question, Plaintiff informed the IRS: "1986: 'no net income'"; "1987: 'I did not file a return because I believe that my professional income was below filing requirements'"; "1988: 'net earnings from self-employment income below and before filing requirement.'"

64. Plaintiff did not rely on IRS silence alone, for when its Fresno Office received bank interest reports and questioned Plaintiff on the whereabouts of his Form 1040s for the years in question, Plaintiff explained that he was deducting his net operating losses in figuring his gross income for reporting purposes, and was told: "We received your letter concerning Form 1040 for the tax periods ending

December 31, 1985 and 1986. We have corrected our records to show that you are not required to file for 1985 and 1986 Form 1040. The reason this problem occurred is because your bank has the interest as individual income and it should be reported as business income. We apologize for the delay in responding and any inconvenience we may have caused. Sincerely, Julia Moreaū, Tax Examiner" (the same notices were received for tax years 1987 and 1988).

65. Even this dramatic evidence of good faith belief Real dismissed out-of-hand: "You're enough of a lawyer that knows there's no estoppel against the government by reason of what some employees might do or don't do, okay" (Transcript 9/13/94, p. 13), confusing reliance upon government officials used as a defense to obeying the law, with reliance upon governmental officials to show the absence of a mental element necessary to convict.

66. It was as if Cheek v. United States, 498 U.S. 192, 199-200 (1991), had never been decided: "The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. In United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933), the Court recognized that: 'Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.' Id., at 396, 54 S.Ct., at 226.".

67. Well-known national surveys have estimated, for

instance, that two-thirds of the advice that even IRS employees provide to the general public, when asked, is not free of errors.

68. Yet, Plaintiff was charged, tried, and convicted of willfully violating the IRS Code without having access to his tax files at trial, and sentenced based on the IRS' estimate of his business gross receipts, accepted matter-of-factly by Real, which included such items as unearned retainers, loans, pass through payments for clients to other firms and vendors with no premium added, trust funds, costs of utilities, books, offices, computer research, and depreciation (Motion 2/24/97).

69. Actually, Plaintiff's tax records which he was not allowed access to at trial would have proven his good faith belief that he had no net income in the years he was prosecuted for, which returns he would have filed sooner had he not been preoccupied with attempting to comfort, care for, and save his only son's life.

70. Real, however, was not interested in such facts, for when, at sentencing, where the length of sentence is supposed to be determined under the Federal Sentencing Guidelines based upon the Government's loss, Plaintiff brought thirteen boxes of his relevant tax records to Court which he had been denied access to at his trial, but Real refused to even consider them: "No, you can't admit them into the record. We're not trying the case now. That's been tried, and the record has been made, Mr. Dubin" (Transcript 1/13/95, p. 36).

71. Moreover, the Plaintiff had not only obeyed IRS directions. He was in the IRS offices being audited for 1986, 1987, and 1988, in conjunction with an already ongoing full-scale field audit being conducted for the tax year 1984, that had been prolonged time-wise due to his son's illness and eventual death, begun before any returns for those three years in question were even due, as the IRS's own records showed, yet Real erroneously states in his Findings of Fact No. 14 that the "failure to file a tax return for the years 1986, 1987 and 1988 was discovered by a Revenue Agent from the

Examination Division of the Internal Revenue Service during the audit of his filed 1984 U.S. Individual Income tax Return Form 1040."

72. Even various Government trial exhibits admitted into evidence contradicted Real's Finding of Fact No. 14, yet Real continued to claim the opposite, with angry intransigence on perhaps the most material good-faith issue in the case, and contrary to the documented facts: "THE COURT: You were not in the IRS office until after you had not filed '86, '87 and '88 returns. MR. DUBIN: All right. Your Honor, that is incorrect. . . . THE COURT: -- that may be incorrect, but it's in the record, Mr. Dubin. MR. DUBIN: May I show you the letters [in evidence]? THE COURT: No, I don't propose you to show me that" (Transcript 1/13/95, p. 35).

73. In the local IRS Honolulu Office, Plaintiff and his examiners watched the filing deadlines for 1986, 1987, and 1988 run out – years in which he had no net income, had told the examiners prospectively that he would be delaying filing and why, and had never been told that he was wrong, which one examiner had to admit under oath before Judge Real "went on throughout the audit": "MR. DUBIN: Did you in any way, in writing, or orally at any time, when I told you about why I didn't feel I had a filing duty, I think to use your words before, did you tell me that I was incorrect? MS. NAKASONE: No, I did not. MR. DUBIN: Did you tell me I had made a mistake? MS. NAKASONE: No, I did not. MR. DUBIN: Did you encourage me to do any research on the subject? MS. NAKASONE: No, I didn't" (Transcript 9/14/94, pp. 40, 48-49).

74. This was no ordinary failure-to-file case from the beginning, as the ruthlessness of the manner in which Plaintiff was targeted and prosecuted did not start with Real, who at the last minute was steered to Plaintiff's case by someone, following a last-minute adroit Government continuance request made by Osborne.

75. The office complaint filed against the Plaintiff, for instance, ignored Plaintiff's sole proprietor status

completely, making it appear to the general public that he had been hiding take-home pay those three years amounting to $1,643,900 – what was actually his total office business gross receipts.

76. And, seeking to capitalize on such exaggerated figures to hang a controversial, high-profile attorney in public, whose civil litigation, for instance, for aggrieved clients against senior IRS officials in the past had surely not endeared him to everyone in the IRS, the issuance by Osborne and Banfe of their false "grand jury" Press Release, supra, on arraignment day virtually crippled Plaintiff's law practice that day and therefore, hardly coincidentally, his means of paying for his defense.

77. The IRS went out of its way to make it appear in that highly deceptive Press Release that Plaintiff's prosecution was for felony tax evasion and had been scrutinized by a citizen grand jury, when later, according to the Court, the referenced indictment was unsuccessfully "never returned" by the grand jury (Transcript 9/20/93, p. 24): [Press Release:] "a Federal Grand Jury indicted Dubin earlier this month, for failing to file income tax returns for 1986, when his income was $530,511, for 1987, when his income was $634,100, and for 1988, when his income was $479,289" (Exhibit to Motion 9/20/93).

D. False Findings Of Fact Denied To Plaintiff Any Meaningful Appellate Review

78. Real's penchant for volatility and for unfairness toward attorneys is well known in the Central District of California, where he was Chief Judge for more than a decade.

79. Based upon the manner in which he presided over Plaintiff's criminal trial, supra, it is difficult to argue with those of the California Bar who, for instance, have called him "a tyrant who is a disgrace to democracy," and who frequently compare "Real to the head of the Spanish Inquisition" and "suffering from 'mental disorders'," Los Angeles Times, May 27, 1985.

80. One of the most respected criminal lawyers nationally, Howard Weitzman, for instance, has been one of the most prominent attorneys in the Central District to publicly dispute the apologetic view that Real is only harsh with lawyers who are unprepared; for according to Weitzman, "I believe I am relatively well-prepared all the time," yet Real "has yelled at me from the bench in front of juries. He has cut off my examination of witnesses in an abrupt and rude manner;" and "in the cases I've tried before him, I don't believe my clients have gotten a fair trial," Ibid.

81. The Transcripts of Plaintiff's trial do not reflect the true tone and temperament of Real during those two days, but for anyone interested in judging his volatility for themselves, since Plaintiff's misdemeanor trial was considered to be relatively minor in stature by the Court, despite Real's last-minute assignment to the case as a senior judge and the subsequent thirty-year consecutive prison sentence he handed out and the $131,658.70 fine, the entire trial was tape recorded and copies of the recordings can probably still be obtained and speak for themselves, minus of course the menacing facial gestures that constantly emanated from the bench.

82. It is more than a matter of constitutional irony that not only would Real never be reappointed to the federal bench by Congress again, which is generally conceded probably even by him, were he not now retired (yet still electing to serve on essentially full-time status), but he continues to periodically sit in the District of Hawaii as a Visiting Judge, when surely none of Hawaii's United States Senators would support his nomination for the Court here.

83. As an end-run, as it were, around the requisite advise-and-consent privileges of local Senators, the federal bureaucracy in the name of efficiency has transformed itself into a mobile bureaucracy which now subjects the residents of our State to jurists from other States such as Real without any say-so by this State's U.S. Senators.

84. Even worse, as Plaintiff's experience shows, the federal bench, at least in the Ninth Circuit, with District

Judges, for instance, frequently sitting on appellate panels and on circuit executive committees, such as Ezra constantly does, has in many ways become a self-protective "Brotherhood of the Bench," which Plaintiff discovered when he appealed his criminal convictions. There seems to be little accountability for the new American Caesars, for even so fundamental an ethical proscription that appellate judges should not confer ex parte with trial judges on cases under appellate review is not even honored in the Ninth Circuit, at least according to one Hawaii District Judge who told six attorneys in Chambers, for instance, including the Plaintiff, that he is called up all the time on his appealed cases, although the appellate judges, again quoting him, "are not supposed to do so."

85. Plaintiff in 1995 filed his first appeal from Real's judgment while a prisoner at Boron Prison Camp in California, in Case No. 95-10040.

86. During the summer of 1995, after having briefed the appeal, Plaintiff was contacted by the office manager of Circuit Judge Cecil Poole's San Francisco Office, through a friend of hers also an inmate at Boron at the time, who informed Plaintiff that he had better object to the Ninth Circuit since Judge Poole had his case and since, according to her, he had become grossly senile, was yelling at his office staff continually, that she had had lunch with then Chief Judge Wallace, and that Judge Wallace said that he understood and that if Judge Poole did not take senior status by the end of the year they would have to bring proceedings against him.

87. She also warned Plaintiff that there was a District Judge from Hawaii that was poor-mouthing Plaintiff to Judge Poole, and that Plaintiff should also be concerned about that as well.

88. There was, of course, nothing that the Plaintiff could do with such inside information, except to wonder about the integrity of the Ninth Circuit Court of Appeals and to worry that the outcome of his appeal would be mishandled or prejudiced by one Hawaii District Judge in particular with

whom he had crossed swords with many times in past cases -- Ezra.

89. Plaintiff was at the time naïve enough to doubt that report, only to receive his appellate panel's opinion at mail call the day after Christmas 1995, to find that not only was the Memorandum decision affirming his convictions written by Judge Poole, and that Judge Poole immediately thereafter took senior status and retired, but that reading the decision it was clear that its author had no understanding of either the facts of the case or the controlling law, which anyone with even one year of law school training can verify for themselves.

90. That Memorandum decision, for instance, merely repeated all of Real's false findings, supra, ending with, as usual, the now totally discredited finding "that Dubin obstructed justice by checking himself into a hospital on the eve of trial," and with respect to the numerous IRS letters that told Plaintiff he had no filing requirement, upon which Plaintiff said he had relied in addition to the IRS instruction booklets and printed forms, the Memorandum decision merely concludes that, despite Real's knee-jerk rejection of that evidence on the record, as shown above, "the district judge apparently weighed this evidence."

91. Plaintiff had been forewarned that despite how unpopular Real was with many appellate judges, who, led by Circuit Judge Procter Hug, Jr., had earlier tried to bring proceedings against him and had failed, friendships with others on the Court of Appeals had prevented any corrective actions against Real except to restrict his case assignments.

92. Plaintiff had complained about not having had his files at trial, supra, and knowing Real's contrary Finding of Fact No. 11 to have been totally contrived purposely to defeat his appeal, notwithstanding the contrary evidence in the record, including even in Real's own recorded words, Plaintiff raised the issue in his first appeal, which his panel in its affirming Memorandum merely obliquely dismissed with a simple concluding sentence that "Dubin's remaining

contentions are utterly meritless and warrant no discussion."

93. After Plaintiff was released from federal prison on the Mainland and finally able to return to Honolulu on October 1, 1996, to a half-way house, shortly thereafter he received a telephone call from attorney James Clement, who for the first time gave him the complete details, not previously known to Plaintiff, how he had gone to Plaintiff's residence the afternoon of September 13, 1994, picked up the wrong files, returned to the courtroom that first day, and found everyone gone.

94. Additionally, Clement informed Plaintiff that Osborne had been giving Government witnesses hand signals during Plaintiff's cross-examination of them, out of the sight of the Plaintiff who faced the witnesses at the time, and Clement, obviously nevertheless reluctant to testify against the IRS as were Dr. Wakuzawa and Dr. deVegvar, finally agreed to put all of those firsthand facts in Declaration form ("I sat as a visitor at Mr. Dubin's tax trial on both days, September 13 an 14, 1994, Judge Manuel Real presiding. I have a vivid recollection of the testimony of Ms. Nakasone (Mr. Dubin's IRS Examiner), and Mr. Bain (IRS Revenue Agent), and of Assistant U.S. Attorney Osborne sitting at the prosecution's table, continually shaking his head up and down, or side to side, during questioning of these witnesses by his assistant and during their cross-examination by Mr. Dubin," Clement's Supplemental Declaration 4/1/97).

95. At Plaintiff's trial, two U.S. Marshals sat behind Plaintiff all of the time, and Plaintiff was jailed during even brief court recesses, and overnight, with instructions from Real to the Marshals not to let "the prisoner" speak to anyone (Transcript 9/14/94, pp. 18-19, 89); therefore, the Plaintiff had not been allowed to talk, except through gesturing, with Clement during the trial, who returned to New York while the Plaintiff remained incarcerated at Halawa Prison thereafter until bail monies could be raised.

96. After receiving Clement's Declaration, explaining that Real's Finding of Fact No. 11, supra, was false, and revealing that Osborne had been head-signaling

testifying Government witnesses during Plaintiff's cross-examining, Plaintiff filed a new-trial motion on January 21, 1997, also seeking Judge Real's disqualification – not only due to his past biased behavior before and during Plaintiff's trial, supra, but since he would be a material witness as to events now being complained of, including his own false findings of fact and perhaps as to any hand-signaling he might have observed from the bench.

97. Continuing to play a cat-and-mouse game with Plaintiff, waiting until his next regular periodic visit to the District of Hawaii, and refusing to say, despite being asked, until at the hearing whether he would allow witnesses to testify, Real did not hear Plaintiff's motion until March 24, 1997, at which time, refusing even to wait a few days that week so that Clement, in Ithaca, New York State, with bags pre-packed, could attend, Real, not unexpectedly, summarily refused to disqualify himself and denied the motion in its entirety ("We were told through Judge Real's clerk that he could not decide until the hearing whether an evidentiary hearing would be allowed. Thus, because the airline tickets cost approximately $2,400, I packed and prepared to be there within 24 hours, should Judge Real allow me to testify," Clement's Supplemental Declaration 4/1/97).

98. At the hearing, Real denied disqualification based upon Plaintiff's first appellate panel's conclusory statement that there had been no prior misconduct on his part, supra, and because Petitioner had raised the issue of his missing files previously in that unsuccessful appeal -- although logically that panel did not have the benefit of Clement's eye-witness account, a classic example of how judicial error can perpetuate itself notwithstanding any mounting evidence to the contrary (Transcript 3/24/97, pp. 2, 708) ("I also recall completely Mr. Dubin's disappointment on the second day of the trial when he opened the file boxes which I had brought back from his office (as ordered by Judge Real) and discovered that I had brought him only his copies of the Government's papers and none of his own defense papers or records," Clement's Supplemental Declaration 4/1/97).

99. In his written order, adding to the draft prepared by Osborne, Real penned-in that there was no "newly discovered evidence" – despite the fact that the falsity of his Finding of Fact No. 11 remained evident on the record (or is that what he meant?), now underscored by the sworn statement of the very person who Real claimed brought Plaintiff his files supposedly at the very start of trial that Monday, who the transcript shows was not even sent to get the files until later that same day.

100. Plaintiff's next, 1998 appellate panel nevertheless, again without oral argument, cryptically affirmed in a two-page Memorandum decision, applying an abuse of discretion standard to Plaintiff's claims of constitutional deprivations, giving to Real once again the presumption of correctness notwithstanding the obvious false nature of his so-called Findings of Fact and without taking into account that Plaintiff had been incarcerated prior thereto without any knowledge of Clement's whereabouts, concluding that (a) "Dubin's new allegations of bias do not evidence 'a deep-seated favoritism or antagonism that would make a fair judgment impossible,'" and (b) "Dubin waited two years to inform the district court that Clement retrieved the wrong files during trial and to raise his accusation of coaching. As such, Dubin failed to exercise due diligence on either claim."

E. Plaintiff Was Welcomed Home By Ezra With Phony Rule 11 Sanctions

101. Plaintiff is a consumer rights attorney who in 1982 moved his lender liability law practice to Hawaii, naively unaware at the time that this State, at least heretofore, had been a one-party State whose governmental affairs were being heavily influenced by one dominant Bank and its one principal law firm.

102. It was not long before Plaintiff became embroiled on behalf of clients in major lender liability litigation, for instance (a) opposing the takeover of Honolulu Federal Savings and Loan Association at the time by a former Secretary of the Treasury, (b) uncovering a fraud by a

former Hawaii Governor attempting to buy a local golf course by taking an undisclosed sandwich position and then reselling it to his own client for a profit, and (c) counterclaiming against the mishandling of client's property by the President of the Bank of Hawaii in violation of federal law – none of which representations endeared Plaintiff to such highly influential opposing parties.

103. One such case, which Plaintiff was working on at the time of his trial, was for a Dr. and Ms. Kunimoto against the Bank of Hawaii.

104. Their case had its roots deeply mired in a decade-long financial dispute between prominent Honolulu physician, Dr. Kunimoto, as borrower, and the Bank of Hawaii as his lender, the most prominent, politically influential institution in the State of Hawaii, whose executives and lawyers continue to dominate local politics and have headed and chaired for years, for instance, the State's powerful Judicial Selection Commission.

105. Dr. Kunimoto and his family, after amassing a net worth of nearly $70,000,000 since late 1971, mostly through real estate investments, aided in part by more than $25,000,000 he had borrowed from a then cooperative BOH, began in 1990 to experience cash flow difficulties, which led to charges of loan defaults and counter-charges of lender interference and account mismanagement, which culminated in nearly a dozen state court lawsuits, including some early collection cases where attorney J. Fidell was appointed a state court receiver for the gross receipts of his medical practice, often leaving the Kunimotos with not enough funds to even pay their personal electric bills or Dr. Kunimoto with enough money to pay his nurses and other office expenses, the most important of which lawsuits included, starting in 1994, Dr. Kunimoto's multi-million-dollar bad faith counterclaim within what became known as "the five state court consolidated cases" eventually tried in 1997 after Plaintiff returned to Honolulu.

106. Plaintiff had represented the Kunimotos in that litigation before incarcerated, and therefore the Kunimoto's

hired a prominent Mainland lender liability expert, who just prior to Plaintiff's return in late 1996 had his pro hac vice status in Hawaii revoked and conveniently was run out of town, leaving the Kunimotos without experienced lender liability counsel.

107. Moreover, Dr. Kunimoto, less than one year before trial, found himself and his wife and children, who had also been sued by BOH over alleged fraudulent conveyances, without trial counsel, and without further litigation funds.

108. It was at that critical moment in 1997, to the apparent unforgiving dissatisfaction of BOH, that Plaintiff and attorney Gregg Young, each a sole practitioner, agreed to represent the Kunimotos as trial co-counsel -- who, as a result of a subsequent three-month jury trial, eventually themselves had to swallow over $500,000 in fees and costs, opposing BOH which reportedly paid their attorneys more than $7,000,000 to collect debts less than one-half that size.

109. Previously, Plaintiff had represented Dr. Kunimoto briefly, drafting his original counterclaim against BOH, but did not participate further in the case until returning from federal prison.

110. Expectations of a fair state court trial for the Kunimotos were however quickly dashed when it was learned that the specially-assigned trial judge for the state court consolidated cases had received a sweetheart mortgage from BOH, i.e., below market terms, only weeks before trial, which recordation had at first been disguised as a loan from another institution, and efforts to have her disqualify herself were denied, while efforts to have her removed from the case by the state appellate court were ignored as "premature."

111. Meanwhile, Plaintiff and Young during trial had even located a confidential informant with personal knowledge that (a) a trial witness in the state court consolidated cases had been the trial judge's loan officer a few months before, on whose credibility she had made evidentiary rulings during trial, whereas that relationship

was never disclosed, and (b) BOH, where the confidential informant had worked as a secretary, had maintained a separate operation there to reward judges and other government VIPs with favorable financial incentives.

112. This information was immediately given to the local prosecuting attorney, to BOH's knowledge and obvious displeasure, yet characteristically was completely ignored and no investigation even thereafter attempted.

113. As might have been expected, the state court trial did not progress well, and Dr. Kunimoto was prevented by the trial judge from even having the jury consider any of the allegations in his multi-million-dollar counterclaim, except for a few thousand dollars' worth of relatively insignificant, alleged overpayments, yet the jury took weeks to render a verdict and reduced its award to BOH on its claimed notes substantially, which verdict Dr. Kunimoto immediately appealed.

114. At the start of the state court trial, however, Dr. Kunimoto, his assets approaching zero, was forced to file for Chapter 11 bankruptcy protection, Bk. Case No. 97-03185, yet the automatic stay was immediately lifted to allow the state court trial to proceed even though Dr. Kunimoto lacked funds to pay his attorneys or his trial experts, and Candon, a resident of the City and County of Honolulu, was appointed as Dr. Kunimoto Bankruptcy Trustee.

115. Candon immediately sided with BOH; he sought to terminate Dr. Kunimoto's Hawaii Supreme Court appeal (alleging it was the property of the Estate), although Plaintiff and Young had offered to brief the appeal without pay, and Candon proposed to enter into a settlement agreement with BOH for virtually no consideration, dismissing the appeal, while at the same time leaving Dr. Kunimoto vulnerable to BOH's motions to declare various pending, remaining claims against him nondischargeable.

116. It was at that juncture that Dr. Kunimoto begged Plaintiff and Young to seek relief for him and his family in federal court.

117. Three papers were filed in this District Court the first week in June of 1998: (a) a motion to withdraw the reference, assigned to Ezra as Civil No. 98-00463, (b) a companion complaint to the motion to withdraw the reference, pursuant, in part, to Section 1334(b) of Title 28, filed by Dr. Kunimoto, alleging, inter alia, various federal wrongful execution and racketeering counts, assigned to Judge Gillmor, later reassigned to Ezra as Civil No. 98-00453, and (c) a separate complaint, filed by Dr. Kunimoto's wife, virtually identical to his, but alleging wrongs in her own right, assigned to Judge Samuel King, later reassigned to Ezra as Civil No. 98-00475.

118. It was Ezra who Plaintiff continues to believe purposely steered Plaintiff's tax case to Real, as Plaintiff had had an acrimonious relationship with Ezra for a decade before, starting when Plaintiff represented a former client of Ezra's accusing him and his law firm at the time of legal malpractice, and that it was Ezra, sitting at the time on numerous Ninth Circuit committees and appellate panels, who poor-mouthed Plaintiff to Judge Poole.

119. For those reasons, Plaintiff filed a motion to disqualify Ezra, which Ezra referred to retired Judge Martin Pence just prior to his death, and who without a hearing claimed to find no grounds for disqualification.

120. On December 22, 1998, when Plaintiff filed his disqualification declaration, he cited numerous instances of personal bias and prejudice evidenced against him for more than ten years in a dozen or more cases in which Ezra had presided, citing in particular one case where Plaintiff had represented that former client of Ezra who made allegations of legal malpractice against him, and Ezra's pejorative remarks at the December 7, 1998, sanctions hearing, lambasting Plaintiff's credibility personally for always portraying himself, for instance, "as a victim. You're always the victim, Mr. Dubin. Unfortunately, you are not a victim unless you are a victim of your own actions" (perhaps Ezra was referring to Plaintiff's continued claims that he had been falsely convicted of three failure-to-file tax misdemeanors).

121. Days later, after that filing, Ezra called an emergency hearing, scolded Plaintiff, childlike, for, among other alleged personal failings, once again allegedly always supposedly portraying himself "as a victim" (another reference to Plaintiff's continued claims that he had been falsely convicted?), while agreeing that, although Ezra did not recall ever being sued for legal malpractice, "had there been some malpractice claim against me that I was unaware of and you prosecuted that claim, I think that it would be incumbent upon me immediately to recuse myself, Mr. Dubin").

122. The disqualification motion was transferred to the late Honorable Martin Pence, who without a hearing on December 30, 1998, denied Plaintiff's disqualification motion, which had been joined in by Young, even though former case records were retrieved proving that indeed, in the case cited to Ezra, Plaintiff's client had made legal malpractice claims, the significance of which for disqualification purposes eventually Judge Pence dismissed on the rather technical ground that the legal malpractice claims were really directed at Ezra's law firm, in which he was a named partner and the supervising attorney in the case -- not him – surely a difference without a distinction, especially one would have thought, given Ezra's promise to "immediately" recuse himself were he to learn that there had been such allegations of legal malpractice against him in the past which had slipped his mind.

123. As reflected in this Court's docket sheets for the consolidated cases, Defendants in those cases moved in unison on August 10 and 17, 1998, with virtually identical filings, to dismiss both complaints, Fidell also asking, in the alternative, for summary judgment.

124. On October 7, 1998, both complaints were dismissed, based exclusively on the ground that only Candon, the Chapter 11 Trustee, had standing to bring those two suits, as reflected in its contemporaneous minute order as shown in entry no. 54 of the docket sheet: "because every claim alleged by Kunimoto originated before he filed for

bankruptcy or during the course of the Chapter 11 phase of his bk case, he and his wife lack standing; therefore, because only the Trustee has standing, both Kunimoto and his

wife's complaints are dismissed (with prej) - by Judge David A. Ezra"

125. After a motion for reconsideration was denied, on December 21, 1998, the Kunimotos appealed to the Court of Appeals in Case No. 98-17419, which was subsequently dismissed by stipulation on February 18, 2000.

126. Plaintiff, who prepared, exclusively signed, and personally filed both complaints, had nonetheless done his homework, notwithstanding a zero litigation budget, and filed both complaints and began to prosecute the cases in the good faith belief that there was supporting case authority to do so:

127. First, Dr. Kunimoto's complaint was filed in tandem with the filing of a timely motion by him as a Chapter 11 Debtor, as required by local bankruptcy rule 5011-1 and as authorized by Section 157(d) of Title 28, to withdraw the reference back to this District Court; had the reference been withdrawn, the district court would have had Dr. Kunimoto's entire bankruptcy case before it, including the complaints; naming Candon as a Defendant there was tantamount to requesting to remove him as Trustee, which is within the power of any debtor to do.

128. Second, Dr. Kunimoto's complaint was filed with the prior consultation and encouragement of his bankruptcy attorney, whom Bankruptcy Judge Lloyd King often referred to as "experienced bankruptcy counsel," and who reviewed the pleadings before they were filed.

129. Third, Dr. Kunimoto's complaint was immediately brought to the attention of the Bankruptcy Court with a simultaneous filing there, and Judge King refused -- over Candon's objection -- to order Dr. Kunimoto to drop the District Court cases.

130. Fourth, the Hawaii Supreme Court had refused

to recognize Candon's claimed exclusive ownership over Dr. Kunimoto's state appellate rights.

131. Fifth, shortly after the filing of Dr. Kunimoto's complaint, before the hearing of the motions to dismiss or for sanctions, his Bankruptcy Case was converted to a Chapter 7, which Plaintiff understood to mean that the ownership of any of his causes of action following the filing of his initial Chapter 11 petition reverted back to him as of the date of the original Chapter 11 filing.

132. Sixth, Dr. Kunimoto's situation was arguably at least a case of first impression, for in Dr. Kunimoto's situation he faced substantial, nondischargeable debts; indeed Candon in two successive filings even admitted there was at the very least "a clear minority view" in other Circuits supporting Dr. Kunimoto's position allowing standing.

133. Seventh, Ms. Kunimoto had not filed for bankruptcy; she was not subject to the Bankruptcy Court's jurisdiction as to her separate causes of action, especially since she was a defendant, with her children, also in the five state consolidated actions, and had had her fair trial rights also individually trampled by the events above described, giving her independent rights to vindicate as a matter of state law, research at the time confirmed.

134. Nevertheless, in his October 7, 1998, Order dismissing both complaints in their entirety, Ezra expressly addressed only the standing issue, ignoring Plaintiff's arguments altogether, explaining that in his view any advocacy of changes or exceptions to existing Ninth Circuit case law made, even to the precedent of a single Ninth Circuit merits panel, and not even one rendered en banc, will not be tolerated in his courtroom: "The fact of the matter is, Mr. Dubin, as far as you and I are concerned, as far as anything you file in this United States District Court is concerned, the Ninth Circuit controls, unless there is a United States Supreme Court decision to the contrary. * * * * It may even be that the Ninth Circuit in a subsequent en banc decision or in an en banc decision from a panel may change the law. That happens, and it happens often enough

so that we very carefully monitor decisions."

135. That view of course is not shared by everyone in the federal system, especially in the context of Rule 11 jurisprudence (Rule 11(b)(2); Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) ("we do not intend to [apply Rule 11] to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself").

136. Anticipating that this Court would dismiss both complaints, BOH, Fidell (who later applied for no monetary award), and Candon all filed for Rule 11 sanctions on September 4, 24, and on October 2, 1998, respectively.

137. Despite the many at least arguable justifications for having filed each complaint, Plaintiff and Young were instructed by Dr. Kunimoto that summer to dismiss both complaints nevertheless without prejudice to save costs in all fairness to Plaintiff and to Young as a global settlement of his differences with BOH, Candon, and Fidell was being reached in Bankruptcy Court.

138. Earlier, on August 10, 1998, BOH was the first defendant thereto serve notice of intention to seek Rule 11 sanctions, its lead attorney forced to admit at an August 30, 1999, evidentiary hearing before a Special Master that the Plaintiff representing the Kunimotos had offered, at least by August 31, 1998, to dismiss both complaints without prejudice, which would have been within the "safe harbor" period of Rule 11, since the very next day her time sheet acknowledged that that "stated intent" to dismiss had indeed been received by her, and in any event BOH's attorney later during questioning admitted that she had extended the safe harbor period "to either Monday or Tuesday," which would have been either to August 31 or September 1, 1998, and further that Plaintiff representing the Kunimotos at the District Court dismissal hearing before Ezra repeated the offer to dismiss without prejudice to everyone present,

including Ezra, as Plaintiff had done in his motion papers on behalf of the Kunimotos.

139. The correspondence between her and the Plaintiff representing the Kunimotos illustrates that a dismissal without prejudice was formally offered, but could not however be filed without BOH's counsel's consent, as she well knew, writing in reply: "You called early this afternoon to inform me that you are withdrawing the Complaints in the above-referenced actions. As we have discussed, Fed. R. Civ. P. 41 allows a unilateral notice of withdrawing a complaint only if there has been no answer or motion for summary judgment. In this case, all Defendants have filed for summary judgment, therefore Plaintiffs must proceed by stipulation or motion. I have prepared a stipulation for dismissal with prejudice, for your signature (enclosed). . . . [T]he Bank cannot agree to stipulate to dismiss this matter without prejudice. . . . . If you choose not to sign the enclosed stipulation and do not otherwise take immediate steps to dismiss the Complaints, we will proceed with the Rule 11 motion."

140. This roadblock to a dismissal without prejudice was also later expressly recognized by Ezra in his eventual sanctions order ("the Receiver's motion is, alternatively, one for summary judgment. For this reason, Plaintiffs may not unilaterally dismiss the Complaints").

141. Neither Plaintiff nor Young had the ability to dismiss the two complaints with prejudice during the safe harbor period, as their clients instructed them not to do so, as attested to in two sworn Declarations therein filed by Dr. Kunimoto ("my wife and I instructed Mr. Dubin and Mr. Young not to dismiss with prejudice" . . . "my absolute refusal to dismiss with prejudice . . . offering to withdraw without prejudice").

142. BOH's attorneys knew and understood this limitation on Plaintiff's authority, but appeared in later testimony to completely misunderstand how the safe harbor provisions in the 1993 Rule 11 amendments are intended to and how they actually work: "Q. [by Dubin] Are lawyers

able to dismiss cases if their client refused to dismiss? * * * * [objection overruled] A. [by Leonard] probably not. I don't believe they could and I don't think that the sanctions were for failing to do it, failing to dismiss with prejudices, it was for filing the frivolous complaints in the first place."

143. Ezra nevertheless imposed Rule 11 sanctions against Plaintiff and Young in their representation of the Kunimotos, nowhere however explaining in his December 7, 1998, sanctions order how Plaintiff and Young were supposed to have dismissed the two complaints with prejudice against specific, contrary instructions having been received from their clients; instead, without an evidentiary hearing, Ezra found their offer to dismiss without prejudice not to satisfy his understanding of "the spirit of the 'safe harbor' provision," but a negotiating tactic.

144. Ezra additionally concluded that the offer to dismiss without prejudice was only made to BOH and not to Candon, when in fact Candon's attorney was copied on Plaintiff's September 2, 1998, written dismissal offer which clearly extended that offer to all parties: "I informed you this week that my clients had decided to withdraw the two above-referenced complaints . . . solely because we believe that it is in the interests of all parties to bring all such related litigation to a close, and we were hoping that by taking that good faith step we would be encouraging all parties, especially the Trustee, to join with us to negotiate a global end to the entire controversy."

145. In Ezra's December 7, 1998, sanctions order, he further says that the Plaintiff and Young filed both complaints for the improper purpose of pressuring BOH into accepting a settlement in the related bankruptcy action, and that that conduct by Plaintiff and Young constituted a long-standing pattern of litigious misconduct on their part that the Court expressed its determination to deter.

146. While the inherent power of any District Court in a proper case, with notice and an opportunity to be heard, to discipline attorneys appearing before it is not disputed, and in appropriate cases to then issue monetary sanctions to

deter litigation tactics that disrupt court processes or prejudice other parties, in the case of the Kunimotos that alleged "pattern" of misconduct charged did not occur in those consolidated cases, but related to unsworn accusations made by BOH's opposing counsel in her papers to Plaintiff's conduct in other cases outside Ezra's jurisdiction, going well beyond the issuance of Rule 11 sanctions for filing papers in his Court in those cases.

147. Moreover, the sanctions motions not only did not inform Plaintiff and Young beforehand that they were going to be Rule-11 tried for a pattern of litigious misconduct outside the jurisdiction.

148. Ezra indeed began the sanctions hearing by informing counsel that he did not even want to discuss any "Rule 11" factual issues at all, but only "the question whether he [Dubin] offered to dismiss this complaint without prejudice at a very early stage, which offer was rejected . . . I want to confine argument to today because the rest of it is entirely in the [paper] record").

149. Similarly, Ezra's December 7, 1998, sanctions order identified no factual basis for his conclusion that either Plaintiff or Young, let alone both of them, had engaged in any such mischievous pattern of misconduct whatsoever, except for its quoting at length out of context from a November 24, 1994, privileged attorney-client fax sent by Plaintiff to his client Dr. Kunimoto which inadvertently found its way into the hands of BOH's counsel, which she thereafter unethically refused nevertheless to return.

150. That fax, inadvertently provided to BOH by Young during discovery in an earlier state court case, referred to an even earlier federal court case way back in the 1980s which did not even involve Dr. Kunimoto, in which both Plaintiff and Young, according to Ezra's sanctions order, "described their successful harass-and-delay strategy" – which was at a time when Plaintiff and Young did not even know each other, which referenced cases Young was not even involved in.

151. In truth, had Ezra bothered to provide Plaintiff and Young with their due process rights and to hold an evidentiary hearing on that sanctions issue, or even a serious oral hearing, he would have discovered that that fax in question was referring, not to any penchant or strategy on Plaintiff's part to run up fees (especially in a case such as that where he and Young were not even getting paid), but to the habit of bank attorneys in Hawaii and elsewhere to gouge their own bank clients, a prophecy that obviously proved true in the Kunimoto cases as far as the amount of claimed Rule 11 fees and costs subsequently showed.

152. An even more disturbing aspect of Ezra's sanctions order, in specifically quoting from Plaintiff's November 24, 1994, privileged fax to Dr. Kunimoto, never even properly introduced into evidence before Ezra, was that he chose to completely ignore the three other faxes sent by Plaintiff contemporaneously which BOH also had copies of but chose selectively not to exhibit to the District Court, which however Plaintiff in his defense did, that were also sent years before to his client Dr. Kunimoto, but in the earlier state court cases, specifically urging Dr. Kunimoto to settle before the fees and costs accelerated on all sides – exactly opposite the specious finding, without the benefit of a hearing, made by Ezra to dishonestly justify granting Rule 11 sanctions for supposedly bad faith litigation tactics by Plaintiff and Young (To Dr. Kunimoto From Dubin, 2/3/95: "It is always better to settle quickly if possible [with BOH], as the fees and costs on each side greatly accelerate." To Dr. Kunimoto From Dubin, 7/20/94: "[T]he best thing to do regarding Bank of Hawaii is to make a settlement proposal . . . . litigation should be a last resort, as it is very expensive and very unpredictable." To Dr. Kunimoto From Dubin, 11/30/94: "[Do] you want to agree to a global settlement with them [BOH] (this is the opportunity to do so if you want to do so)."

153. Ezra held that he was not invoking any inherent power to punish for bad faith litigation tactics, by further order entered August 31, 1999, stating (a) that he had exercised his authority solely under Rule 11 only, and

(b) that Plaintiff had been given a hearing on all issues, even though the December 7, 1998, Transcript shows that that hearing started off by his restricting all oral argument to only the safe harbor issue, supra, and without a single evidentiary inquiry even as to that.

154. Ezra nevertheless arrived at sweeping "inherent power" generalizations, merely rubber-stamping the adversarial arguments of BOH's counsel: "By ordering sanctions against Plaintiffs' counsel in this case, the court hopes to put an end to their continued misuse of the federal court system. Frivolous lawsuits filed for improper purposes of harassment and delay will not be tolerated."

155. Ezra's December 7, 1998, sanctions order referred the determination of the amount of sanctions to a Magistrate Judge whose reappointment, and therefore whose independence from the influence of the Ezra, was highly questionable at best at the time – who was subsequently not reappointed.

156. Plaintiff and Young were then fined $116,862.32 without being allowed adequate discovery, briefing, or evidentiary hearing time, based in part upon "block billings" which were shown in camera, over their objection, only to the Special Master and which have remained sealed to this day, and the sanctions award adopted by Ezra was contrary in large measure to the fee standards of the Court, and even the requirement of law that a transcript of all proceedings be submitted by the Special Master with his Report was ignored and no such evidence was before Ezra at the time he adopted the Special Master's Report.

157. Based on all of the above shortcomings, Plaintiff and Young separately appealed to the Ninth Circuit Court of Appeals, after Plaintiff posted $116,000 in cash, borrowed from sympathetic clients and other friends, which he was required by Ezra's order, over Plaintiff's written objection, to deposit with the Clerk of the Court, who in turn deposited the $116,000 into a special federal depository account maintained by the Clerk at First Hawaiian Bank at a negotiated interest rate which was and remains substantially

below that which any trust deposit for the benefit of BOH and Candon would have earned on those same funds in that same Bank during the appeal.

158. Once again, a Ninth Circuit merits panel, in Case Nos. 00-15157 and 00-15202, merely rubber-stamped the lower court's findings: "The question before us is whether the district court abused its discretion in either the awarding of or the amount of Rule 11 sanctions. . . . In sum, we find that despite the magnitude of the award, the special master's lengthy proceedings and thorough 36-page opinion substantiates that the award was within the discretion of the district court" (the beginning and the concluding sentences of the Memorandum decision).

159. Prior to the oral argument, it was disclosed that Judge O'Scannlain, who eventually wrote the Memorandum decision and who showed considerable acrimony toward Plaintiff personally in a later dissent, alone refusing to allow a stay of the mandate, and who was a member of Plaintiff's panel which affirmed his tax convictions in 1995, was also to hear the sanctions appeal.

160. Believing that it was unfair that the same Judge who ruled unfavorably as to Plaintiff's good faith in not filing tax returns, and as to Plaintiff having supposedly checked himself into the Hospital to obstruct justice, should make a determination thereafter as to Plaintiff's good faith with respect to alleged Rule 11 violations on appeal, but as usual the recusal motion was summarily denied without explanation.

161. As with the affirmance of his tax convictions, after being forced by the panel to add another $15,000.00 in cash to his bond in order to stay the sanctions pending further review, Plaintiff sought review by the Supreme Court of the United States as to the Rule 11 award, and once again, not styling itself as an error-correction court, the High Court declined review: Plaintiff's 1995 Certiorari Petition was denied review in Case No. 96-232 (tax convictions); Plaintiff's 1998 Certiorari Petition was denied review in Case No. 98-52 (new trial motion); and Plaintiff's 2002

Certiorari Petition was denied review in Case No. 01-1666 (Rule 11 sanctions).

F. Plaintiff Has Now Been Exonerated By Almost Everyone Except This Court

162. Upon returning to Honolulu as a largely discredited "ex-con" in the perception of some in late 1996, having lost all of his clients and his entire law practice of over thirty years, Plaintiff not only had to contend with certain economic realities, but was instantly hounded by the local IRS Office to complete his back tax returns.

163. Ms. Pamela Mayo was the new Examiner assigned to Plaintiff's case; some of Plaintiff's friends retained a local CPA, Mr. Warren Duryea, to assist him in the preparation of his back returns, which was a requirement for his continued one year requirement of "supervised release" (otherwise Plaintiff could be picked up and jailed again anytime), and Ms. Mayo, demanding that the returns be done her way, insisting that Plaintiff's "taxable income" for the years in question, which she had already calculated for him, totaled $902,035.00 for all three years combined, which was almost double what even Real had supposedly found at Plaintiff's 1994 trial ($284,452.00 in 1986, $365,130.00 in 1987, and $252,453.00 in 1988), in the process threatened Plaintiff's CPA with not being able to represent clients before the IRS ever again unless he accepted her numbers, at which point he quit, leaving Plaintiff to do the returns himself.

164. Ms. Mayo, moreover, was not satisfied with the pace of Plaintiff's progress on the returns, notwithstanding having been responsible for Mr. Duryea's abrupt departure, and after a bull-in-a-china-shop-like interruption of the Plaintiff and the Presiding Judge while they were in the middle of a three-month jury trial in First Circuit Court, checking up to see if the Plaintiff was actually there, so she said, Ms. Mayo gave a written order to his local Probation Officer, Ms. Merilee Lau, to have Plaintiff arrested and placed back in prison, which thankfully Ms. Lau matter-of-

factly ignored.

165. The vengefulness of Osborne, moreover, did not stop with Plaintiff's convictions, for Osborne filed a complaint with the Hawaii Office of Disciplinary Counsel and with the California State Bar Court, where Plaintiff is also licensed to practice law, demanding that Plaintiff be disciplined, which in Hawaii, for failure-to-file convictions by Hawaii attorneys, has resulted in the past with the issuance of public reprovals, and in California, as a consequence of three relatively recent California Supreme Court decisions there, in a two-year mandatory suspension.

166. However, after a three-year investigation by the ODC, led by staff attorney Michael Lee, Plaintiff became probably the first attorney in American history not to be disciplined for having had a federal failure-to-file conviction, for a jury of Plaintiff's peers, as it were, by notice of its decision dated January 27, 1998, determined that "a finding of professional misconduct" due to Plaintiff's "unique circumstances pertaining to your matter" was found "not warranted" (emphasis in the original).

167. Similarly, the Judges of the California Bar Court, where the procedures are more formal, and Real is better known, refused nevertheless to apply the applicable California Supreme Court precedent to Plaintiff's situation after a five-year investigation, instead burying the matter in an informal settlement which however required, as the lightest option possible, a "public reproval," which appeared in the June 2000 edition of the California Lawyer and which read more like an a sympathy note than a reprimand: "In January 1994 Dubin was convicted of violation of 26 USC section 7203, failure to file federal income tax returns, from 1986 through 1988. He has since filed the returns but owed not taxes for those years because of business losses. At about the same time he failed to file the tax returns, he was being audited. He received a letter from an employee of the Internal Revenue Service stating that he was not required to file income tax returns for the years covered by the audit. There were no factors in aggravation. In mitigation, at about

the time of the misconduct, Dubin was under great stress because his son had been terminally ill and passed away in 1992. The misconduct was due, in part, to the letter he received from the IRS stating that he was not required to file the tax returns. Also, the misconduct did not involve clients."

168. The assistance of the Probation Department and the Hawaii and California disciplinary authorities, supra, for which words alone will never be able to capture the felt gratitude, protected Plaintiff's physical and economic freedom and his ability to reestablish his law practice in this State.

169. But it was finally the assistance of this State's political leadership that secured for Plaintiff the fair audit that he finally received from the IRS Mainland District Office which for the three years in question now proves that Osborne, Peyton, Real, and Mayo were mistaken, reckless, dishonest, or worse.

170. First, in 1994 then State Senator Richard Matsuura took a personal interest in Plaintiff's case. Not known to Plaintiff before 1994, Matsuura secured an accountant for Plaintiff, who quickly determined that Plaintiff had no taxable income during the three years in question, an opinion which the Arthur Andersen firm also when asked would subsequently affirm, and Matsuura immediately went to friends of his at the local IRS Office with her report, but upon returning, informed the Plaintiff that there was something political going on in his case that was interfering with Matsuura's efforts to be heard on Plaintiff's behalf, which he said he was determined to uncover.

171. Second, Matsuura then began to inquire of his many colleagues in the State Legislature, his many friends in the State and Federal Judiciary, and many attorneys he knew in the Hawaii Bar, and was told by virtually everyone contacted, he reported to Plaintiff, that Real was considered by everyone contacted to be an irrational courtroom tyrant, and, more determined than ever, volunteered to continue to

try to assist Plaintiff to get a fair hearing; he contacted Senator Inouye and Senator Akaka on Plaintiff's behalf just prior to Plaintiff's sentencing, and although they tried to help, and were successful in arranging two meetings with the U.S. Attorney, Osborne was asked to participate at the meetings, made false statements regarding Plaintiff's past filing practices, which Plaintiff later found out embarrassed Senator Inouye especially and thwarted and scuttled Matsuura's efforts as the U.S. Senators he contacted had no means of countering Osborne's misrepresentations designed to cast the Plaintiff in a further false light.

172. Third, unfortunately, shortly after Plaintiff returned to Honolulu, Matsuura was diagnosed with cancer and passed away, but not before having had breakfast with the Plaintiff and having fully informed the Plaintiff what he had learned in the interim regarding who had politically targeted him and who had had Real switched in place of Kurren to be his presiding trial judge.

173. Fourth, Plaintiff followed up on his own as Matsuura had suggested, and contacted Senators Inouye and Akaka and Congressman Abercrombie and Congresswoman Mink for assistance directly, seeking to have Plaintiff's IRS audit transferred to the Mainland District Office and to an impartial Examiner.

174. Fifth, ironically, Plaintiff had enjoyed excellent professional relationships for decades with IRS agents, had himself a high appreciation for their fairness in his personal experience, had never been exposed to any rudeness or unprofessional conduct on their part before his recent ordeal with the Criminal Investigation Division, and even his 1994 local Examiner, Ms. Janet Nakasone, was a pleasure to work with, although it is difficult now to forgive her less than always truthful, perhaps coerced, testimony at his trial.

175. Sixth, the next-to-final breakthrough in Plaintiff's exoneration came when, after Senator Inouye and Senator Akaka and Congressman Abercrombie led the way, writing the IRS on Plaintiff's behalf seeking in unison to move the audit of his returns to the IRS Mainland District

Office, the late Congresswoman Patsy Mink's tenacity finally resulted in what proved to be the turning point in Plaintiff's relations with the IRS – for, at her dogged insistence, on November 6, 1998, she finally heard from the Department of the Treasury that they would find a guaranteed impartial IRS Revenue Agent at the Mainland District Office who would "provide an immediate and unbiased review of any information and documentation Mr. Dubin would like to submit," and that is what finally did happen, which speaks highly of the integrity of the IRS to have now been willing to admit that their agents in Honolulu were wrong.

176. Seventh, now Plaintiff also has sworn statements from attorney Clement, Dr. Wakuzawa, and Dr. deVegvar, supra, all of which prove that Real's Findings of Fact in most material respects were completely erroneous or worse.

177. It is time for this Court also to act to correct the injustice inflicted on this Plaintiff when this Court allowed Real, as a Visiting Judge, to preside so unfairly over Plaintiff's tax trial, while Plaintiff was forcibly handcuffed on his orders and taken directly from his Hospital bed to the Court House, ill and sedated, without counsel and without his tax or case files, tried by secret ex parte communications between Real and Osborne and Peyton, belittled in front of a packed courtroom, trashed in the media, convicted on false findings of fact so as to defeat any appeal, and then railroaded into a prison cell, and, upon being released and returning to Honolulu, to be next fined $116,862.32 by a local District Judge who most Members of the Hawaii Bar know to be a younger version of Real, a totally defensive individual who is completely lacking in judicial temperament.

G. Plaintiff Prays For Relief From Fraud Upon The Court

178. This is not an action based upon newly discovered evidence; this is an independent action seeking relief grounded upon fraud having been committed upon this Court by officers of this Court, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944) (where an

attorney had participated in the fabrication of trial evidence). That is the basis of this Court's jurisdiction in this case.

179. None of the issues raised in this Complaint were decided in prior cases or on appeal, for the prior cases were decided by Judges, the honesty of whose decisions are being challenged here, and because the prior appeals were decided giving due difference to the very findings of fact below which are here being challenged as intentionally contrived.

180. The need for redressing "fraud upon the court" Justice Black explained in Hazel-Atlas Glass, 322 U.S. at 246, in the following terms: "[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that the preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

181. First, Plaintiff seeks the setting aside of his three misdemeanor failure-to-file convictions for fraud upon the court committed by Real, Osborne Peyton, and Banfe, all lawyers and officers of the court, and the dismissal by the IRS and the USA of the Criminal Complaint that was filed against the Plaintiff, plus the return of his $131,685.70 fine with market-interest thereon, together with his fees and court costs since August 27, 1993:

a. on substantive due process grounds, in that the IRS Mainland District Office has now cleared him of having had any taxable income for any of the three years in question,

b. on procedural due process grounds, in that as a result of their secret, false, ex parte communications to, and accepted and acted upon by, the trial judge, Plaintiff was tried without his files, while ill, sedated, and deprived of

sleep, and

c. on both substantive and procedural due process grounds, in that the trial judge falsified material findings of fact stating, by way of example only, that the trial court had verified that the Plaintiff was in good health and that he had had his files commencing the morning of trial.

182. Second, Plaintiff seeks monetary sanctions individually against Real, Osborne Peyton, and Banfe, all lawyers and officers of the court, and against the IRS and the USA pursuant to the doctrine of respondeat superior to the fullest extent permitted by law and to the extent that restitution cannot be fully secured from each of the four of them, for the aforesaid fraud upon the court as compensation for the resulting loss of liberty and property caused the Plaintiff, together with his fees and court costs since August 27, 1993:

a. against Real individually, on the basis that judicial immunity does not protect judges from civil liability and/or providing restitution in the case of their criminal wrongdoing in intentionally entering upon the public record false findings of fact, a form of official perjury, and

b. against Osborne, Peyton, and Banfe, each individually, on the basis that prosecutorial immunity does not protect prosecutors in the performance of investigative work, which is precisely the function which was being carried out by them when they conspired to and did defraud the Court by conspiring to provide and by providing false ex parte information to Real concerning Plaintiff's health and supposed discharge from the Hospital, an egregious ethical breach under applicable Local Rules of Professional Conduct.

183. Third, Plaintiff seeks the setting aside of his and Young's Rule 11 sanctions, aforesaid, for fraud upon the court committed by Ezra, a lawyer and an officer of the court, plus the return of Plaintiff's now $131,000 cash supersedeas bond being held by the Clerk of the Court, with market-rate interest thereon, together with both of their fees

and court costs since September 4, 1998:

a. on substantive due process grounds, in that Plaintiff and Young had clearly offered on the record repeatedly to dismiss both complaints without prejudice as to all parties and fully within the safe harbor period and were otherwise powerless to dismiss with prejudice due to the contrary instructions of their clients, notwithstanding contrary false findings of fact entered by Ezra, a form of official perjury,

b. on substantive equal protection grounds, in that the Rule 11 sanctions entered against them are in conflict with this Court's applicable Local Rules being applied substantially differently to fee allowances otherwise being granted by this Court to others,

c. on procedural due process grounds, in that, by way of example only, they were denied access to BOH's in camera submissions to the Special Master, adequate evidentiary time in which to take testimony, and a transcribed evidentiary record of the Special Master's proceedings for review by the District Judge as required by law,

d. on both substantive and procedural due process grounds, in that Ezra falsified material findings of fact stating that the trial court had personal knowledge of a pattern of joint misconduct by Plaintiff and by Young in other cases and in other jurisdictions, especially supposedly at a time that the two did not even know one another, and

e. on both substantive and procedural due process grounds, pursuant to Sections 144 and 455 of Title 28 of the United States Code, and the Code of Judicial Conduct, for having failed to recuse himself after acknowledging that he would do so if allegations of legal malpractice had been made against him by one of Plaintiff's former clients during Plaintiff's representation of that client, which was subsequently documented as true.

184. Fourth, Plaintiff seeks monetary sanctions individually against Ezra, a lawyer and an officer of the

court, for the aforesaid fraud upon the court as compensation for the resulting property caused the Plaintiff, together with his fees and court costs since September 4, 1998, on the basis that judicial immunity does not protect judges from civil liability and/or providing restitution in the case of their criminal wrongdoing in intentionally entering upon the public record false findings of fact, a form of official perjury.

185. Fifth, Plaintiff seeks the issuance of a mandatory injunction against the Judicial Council, ordering it to fulfill its mandated responsibilities under the Judicial Councils Reform and Judicial Conduct and Disability Act, heretofore neglected, to investigate the charges against Real and Ezra contained herein and to thereby fulfill its mandated responsibilities pursuant to the Good Behavior Clause of Article III, Section 1 of the United States Constitution.

186. Sixth, Plaintiff seeks the issuance of a mandatory injunction against Chinn, ordering the Clerk's Office through him to immediately transfer and to maintain Plaintiff's supersedeas cash bond aforesaid pertaining to Plaintiff and to Young's Rule 11 sanction, supra, in a separate interest bearing account at First Hawaiian Bank earning the highest rate of interest possible until further orders of this Court.

187. Seventh, BOH and Candon are named herein as Nominal Defendants for notice purposes, being otherwise necessary and indispensable parties to the Rule 11 sanctions' relief being sought herein.

188. Plaintiff finally seeks by this Complaint to have his good name restored to him, and to be free of the continued personal and professional defamation that the official wrongdoing referenced above continues to generate against his financial and emotional security and well-being in and outside this State.

189. Plaintiff's daily pain in this regard has not been rendered moot by the passage of time, and is more than a mere theoretical concern, as evidenced by the potentially daily ridicule and false light that his misdemeanor tax

convictions and their aftermath, for example, cause him whenever his name for whatever business or personal reason is entered on Internet search engines, which automatically retrieve misleading information as that shown in Exhibit "A", unfairly dwarfing his otherwise spotless record shown by comparison in Exhibit "B", which disgusting defamation can only be deleted once his false tax convictions are set aside, triggering the removal by the California Bar Court, for instance, of his minor California public reproval, supra.

DATED: Honolulu, Hawaii; February 10, 2003.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Attorney for Plaintiff

EXHIBIT "A"

JUDICIAL/LEGAL MISCONDUCT IN HAWAII

Following are some of the attorneys or judges who have been charged with misconduct, who have been reported to have been disciplined by the State of Hawaii for unethical conduct, who may be a resident of the State of Hawaii and who were disciplined in another jurisdiction, sued for malpractice, incarcerated, whom we understand have been charged with unethical conduct, or who have brought disrepute to the legal business, etc.

* * * *

DUBIN, GARY VICTOR [#34595]*

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email: clr.org

*California Bar Number

EXHIBIT "B"

Personal and Professional Resume
of
Gary Victor Dubin

ATTORNEY

Gary Dubin is admitted and licensed to practice law in the State and Federal Courts in Hawaii and California and is a Member of the U.S. Supreme Court Bar.

Mr. Dubin's practice began with the prestigious law firm of Covington & Burling in Washington, D.C. as a law clerk; before moving his practice to Hawaii in 1982, Mr. Dubin traveled between coasts on a weekly basis for nearly a decade, serving clients in California and the New York area.

Mr. Dubin has directed major litigation involving shareholder derivative actions, lender liability real estate disputes, trade secret matters, trusts and estates administration, and bankruptcy proceeding; he has practiced before the U.S. Supreme Court, New York and New Jersey state and federal courts, and courts in California, Tennessee and Hawaii; he has also managed multi-million dollar land tracts for clients.

Mr. Dubin has managed several multi-million dollar corporations for clients as well serving as Chief Executive Officer and Board Chairman of public and private corporations for several years; he has served as Executor and as Trustee to several multi-million dollar estates and trusts.

On behalf of clients, Mr. Dubin has worked closely with Congressmen and Senators, the Renegotiation Board, the GAO, the Economic Development Administration, the Small Business Administration, the U.S. Department of Justice and other agencies of government.

Mr. Dubin has also practiced extensively in the fields of Entertainment Law and Corporate Reorganizations. His clients have included many leading business men and

women, attorneys, judges, accountants, developers, and media celebrities.

LAW PROFESSOR

Gary Dubin joined the Stanford Law Faculty as a Teaching Fellow in 1963, teaching Legal Analysis, Legal Research and Writing, and Contracts; while at the University of California, Berkeley, from 1964 to 1966, he taught seminars on the Sociology of Law.

Mr. Dubin was appointed to the University of Denver Law Faculty in 1966, where he taught Decision Process, Criminal Law, Remedies, Jurisprudence, and Legal History.

Mr. Dubin left Denver in 1969 to accept a faculty-level research and teaching position with the Harvard Law School.

Since 1967, Mr. Dubin has lectured and taught seminars at the RAND Corporation in Santa Monica, the Harvard Law School, the Justice Department in Washington, D.C., the University of Texas Law School, the UCLA Institute of Government and Public Affairs, the University of Southern California School of Public Administration, the California Council on Criminal Justice, and the National Advisory Commission on Criminal Justice Standards and Goals in Washington, D.C., and private seminars on Law and Social Change.

Mr. Dubin has authored numerous professional articles and books and special reports, published by New York University, Stanford University, the University of Denver, UCLA, the RAND Corporation, and the United States Department of Justice, on topics pertaining to law reform, court administration, and urban decision making.

Mr. Dubin, during his career as a law teacher, developed many new pioneering concepts for teaching rule making and legal analysis as the authoritative management of multi-disciplinary uncertainty.

RESEARCHER

Gary Dubin began his extensive early research career as a Russell Sage Foundation Fellow at the Law and Society Center at Berkeley in 1964 where he studied social science research methodology in relation to legal analysis and participated in the research activities of the Center until 1966.

From 1968-1969, he was the Director of the Criminal Justice Program at the University of Denver; in 1969 he joined the Harvard Law School Criminal Justice Center as a Russell Sage Fellow, and in 1970 became a Resident Consultant at the RAND Corporation "think tank" in Santa Monica, developing computerized decision theory for several urban social problem management projects.

In 1970, Mr. Dubin was honored with appointment to the National Institute of Law Enforcement and Criminal Justice within the U.S. Dept. of Justice (LEAA) as its first Visiting Fellow with a research grant to continue his work in criminal justice research.

In 1971, Mr. Dubin was appointed the Executive Director of the Southern California Criminal Justice Research Center, and developed a knowledge support system and research programs for local criminal justice agencies. Mr. Dubin also served as the Chief Consultant from 1971-1972 to the Alameda Regional Criminal Justice Planning Board, supervising its research projects.

From 1972-1973, Mr. Dubin was Principal Consultant to the Courts Task Force of the President's National Advisory Commission on Criminal Justice Standards and Goals and developed the central administrative theme for the Commission's Report on the Courts.

BUSINESSMAN

Gary Dubin has been in corporate management since he was 19, when he started his first corporation manufacturing and distributing educational tape recordings nationwide, one

of the first such companies, while he was a student at U.S.C.

In addition to starting and managing corporations, including a chemical company and a leading boat manufacturer, Mr. Dubin has performed key management roles for companies owned or controlled by client at their request, including manufacturing companies, a golf course, a newspaper, and real estate investment companies, and holds personally several U.S. Patents.

As Chief Executive Officer, Board Chairman, and a Director of both public and privately held corporations, Mr. Dubin has had extensive experience in virtually every aspect of corporate management, including financial, personnel, production, preparation of SEC documents and filings, and was a founding member of the National Association of Corporate Directors.

Mr. Dubin has also had extensive business training and experience in the entertainment industry in virtually all phases of motion picture management and financing and was Chief Executive Officer of his own film production company for several years while residing in California.

Mr. Dubin has appeared in various editions of Who's Who in American Business and Finance, Who's Who in America and Who's Who in American Law, since 1967. Since 1973, Mr. Dubin has been especially active in real estate development, and has personally planned and supervised various private landscaping projects both in Hawaii and on the U.S. mainland.

EDUCATION

Gary Dubin graduated first in his class at Los Angeles High School in 1956; he received his A.B. degree, summa cum laude, from the University of Southern California in 1960, graduating first in his class, majoring in Political Science and Soviet Studies, Phi Beta Kappa, a student senator and fraternity president and was awarded the University's highest graduating honor for scholarship, athletics, and community service, the Order of the

Palm.

Mr. Dubin attended New York University Law School as a National Root-Tilden Scholar, receiving a J.D. degree, cum laude, in 1963 as Law Review Executive Editor and Member, Order of Coif.

In 1963-1964, Mr. Dubin engaged in post-graduate studies in law and social science research and language analysis at Stanford University, and from 1964-1966 he was a resident at the Law and Society Center at the University of California, Berkeley, as a Russell Sage Foundation Scholar doing post-doctoral work in the sociology of law.

In 1969-1970, Mr. Dubin was honored with appointment to the Harvard Law School as a Russell Sage Fellow at the Criminal Justice Center and did postgraduate work at Harvard in decision making theory.

Mr. Dubin served his country in the United States Air Force, honorably discharged in 1962, and he has received top secret Government security clearance.

2. Plaintiff's Motion To Set Aside Fraudulent Failure-To-File Convictions And Criminal Sanction of $131,685.71 And For Reimbursement Thereof, Including Interest And Attorney's Fees, Filed November 11, 2003, In The United States District Court For The District Of Hawaii

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GARY VICTOR DUBIN,	)	CV. NO. 03-00058
	)	
Plaintiff,	)	PLAINTIFF'S MOTION
	)	TO SET ASIDE
vs.	)	FRAUDULENT FAILURE-
	)	TO-FILE CONVICTIONS
MANUEL L. REAL,	)	AND CRIMINAL
individually; THE INTERNAL	)	SANCTION OF

REVENUE SERVICE; THE UNITED STATES OF AMERICA; LESLIE E. OSBORNE, JR., individually; JOHN F. PEYTON, JR., individually; CHARLES BANFE, individually; DAVID ALAN EZRA, individually; BANK OF HAWAII; JOHN CANDON, individually; WALTER A. Y. H. CHINN, as Clerk of the United States District Court for the District of Hawaii; and THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT, Defendants.	$131,685.71 AND FOR REIMBURSEMENT THEREOF, INCLUDING INTEREST AND ATTORNEY'S FEES; DECLARATION OF GARY VICTOR DUBIN IN SUPPORT OF MOTION; EXHIBITS "A" THROUGH "G"; CERTIFICATE OF SERVICE

PLAINTIFF'S MOTION TO SET ASIDE FRAUDULENT CRIMINAL SANCTION OF $131,685.71 AND FOR REIMBURSEMENT THEREOF, INCLUDING INTEREST AND ATTORNEY'S FEES

COMES NOW Plaintiff GARY VICTOR DUBIN, and hereby moves this Honorable Court for an Order setting aside the fraudulent failure-to-file convictions and criminal sanction imposed upon him in CR 93-1434 in this Court by the Honorable Manuel L. Real in the amount of $131,685.71 and for immediate reimbursement thereof, with interest and attorney's fees, from the United States of America, for the reasons set forth in the accompanying Declaration of Gary Victor Dubin and the Exhibits attached thereto.

This Motion is made pursuant to Local Rule 7.2, the Due Process Clause of the United States Constitution, the inherent power of this Court to set aside orders and judgments based upon fraud and/or mistake, in the interests

of justice, and is based upon the papers and files in this action.

DATED: Honolulu, Hawaii; November 11, 2003.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Attorney for Plaintiff

DECLARATION OF GARY VICTOR DUBIN IN SUPPORT OF MOTION

I, GARY VICTOR DUBIN, HEREBY DECLARE:

1. I am the Plaintiff in this action; I am admitted to practice law in this United States District Court, and I make the within statements based upon my own personal firsthand knowledge.

2. With the exception of seven years researching and teaching law at Stanford, Berkeley, Denver, Texas, Harvard, the RAND Corporation, USC, and UCLA, I have been in the private practice of law for forty years.

3. Throughout my entire life, beginning while on duty with the Air National Guard and the Air Force Reserve upon graduation from high school, I have filed federal income tax returns.

4. In years in which I have had no taxable income due to business deductions and expenses as a sole practitioner, however, I would occasionally delay filing, as many do, on the advice of the IRS Fresno Office, also based upon printed instructions from the IRS itself for small businesses that was sent to me, informing me that without income after deducting business losses I had no filing requirement, as shown, for example, in the true and correct copy of the written instructions I received from the IRS for some of the very years in question, set forth in Exhibit "A".

5. Nevertheless, I was served with a criminal

misdemeanor complaint in 1993, bench tried by the Honorable Manuel L. Real visiting in Hawaii in 1984, and sentenced to 30 months in federal prison for allegedly having had over $500,000 in taxable (not gross) income for the tax years 1986, 1987, and 1988 combined, and having delayed filing federal income taxes, as set forth in the true and correct copy of Judge Real's Findings of Fact set forth in Exhibit "B".

6. As a result of Judge Real's finding of my supposedly having had over $500,000 in taxable income, I was further fined $125,000, based upon the application of the then existing U.S. Sentencing Guidelines, as set forth in Exhibit "C", and further fined $6,685.71 for the government's costs of prosecution.

7. Having been arrested at the Hospital the morning of trial, after the prosecutors erroneously informed Judge Real secretly that according to them the "duty doctor" (who has now testified under oath this year that he never made any such statements to the prosecutors), told them supposedly that I was faking my illness to avoid trial, I was tried by Judge Real without being allowed to have my tax files with me for my defense.

8. The morning of the first day of the one and one-half day bench trial, I informed Judge Real that I did not have my tax files with me for my defense, having been handcuffed and brought to trial almost literally with little more than my hospital gown, at which point Judge Real in instructed an attorney in the audience, James Clement, Esq., to go to my home on the other side of the Island and to bring my files to me.

9. I did not have my tax files at trial. The first-day trial transcript documents that Judge Real, acknowledging that I did not have my tax files in court and that he had sent Mr. Clement to get them for me, also documents that at the end of the first day of trial Judge Real also acknowledged that I did not yet have the files, as shown in the true and correct copy of the relevant pages of the September 13,

1994, transcript set forth in Exhibit "D".

10. Even at sentencing, as shown in the true and correct copy of the January 13, 1995, sentencing transcript set forth in Exhibit "E", when I was finally able to bring to court with me my tax files (thirteen boxes worth), and even though the sentence to be imposed (both as to length of imprisonment and as to the amount of the fine) was supposed to be based as a matter of law upon "the government's loss," Judge Real refused to allow me either to comment upon or to place that evidence in the record, claiming – *Alice-in-Wonderland*-like -- that I had had my chance to do that at trial, over my objection placed on the record that those tax files would show, to the contrary, that there was no government loss whatsoever.

11. Instead, right after sentencing, Judge Real filed his Findings of Fact on January 20, 1995 (Exhibit "B"), contradicting the trial record, *supra*, by claiming in his Finding of Fact No. 11, in an obvious attempt to cover-up his abuse, that my tax records "were brought to him during the morning of September 13, 1994 by a friend, also a lawyer [Clement], and those records were available to DUBIN throughout the trial."

12. Upon returning from federal prison, I was able to contact Mr. Clement, who I had learned had relocated to New York State after my trial, and Mr. Clement, learning for the first time of Judge Real's erroneous Finding of Fact No. 11, submitted a declaration under oath, a true and correct filed-copy of which is set forth in Exhibit "F", explaining that he was the one who was instructed by Judge Real to go to my house to find and bring to me my files, that he however was unable to return to the Courthouse until after the first day of my one and one-half day trial had already concluded, and that he had brought me the wrong files, not my tax files, which he could not find, but merely copies of the government's exhibits.

13. Upon returning from federal prison, and after being unable to get Judge Real to reconsider my convictions or my sentencing, having been unable either to persuade the

appellate courts, which showed him extraordinary due diligence, or the local Honolulu IRS Office to reevaluate my case, I was finally successful in securing a complete audit of my tax returns for the entire past fifteen years from the IRS Seattle District Office and a highly experienced, senior IRS agent was specially assigned to my case by the District Director himself, assuring me in writing that they would give me a fair and impartial review, notwithstanding what had happened to me at trial. I confess I was indeed skeptical.

14. Earlier this year that IRS examination, which took more than five years, was completed, and I was informed that for the three tax years in question, 1986, 1987, and 1988, the IRS had concluded that it was mistaken and that I had had no taxable income whatsoever during any of those years and that I would not even be assessed any failure-to-file penalties for those or for any of the fifteen years that I asked to be audited – the same result that I surely would have secured had I had a fair prosecution, a fair trial and had I been allowed to have my tax records with me at trial.

15. I therefore filed this lawsuit in February of this year to secure my exoneration, to restore my good name, and in the hope that this Court will respond to the fraud waged against me and this federal court by sanctioning those responsible for this disgraceful miscarriage of justice that ruined nearly an entire decade of my life, so that such an injustice might never happen to anyone else ever again.

16. The Seattle District Office IRS agent in charge of the examination did not, however, formally sign off on his report until June 30, 2003, after consulting with his superiors, and I did not formally sign off myself on his findings until July 10, 2003, and I was only notified last week that the findings of the District Office were formally approved by the IRS just this month.

17. Upon filing my Complaint in this action in February of this year, I immediately sent a copy to the Seattle District Office, which has been fully aware of this suit for fraud committed in part by the Honolulu IRS Office

against me, yet as an extraordinary tribute to the fairness and integrity of the IRS the Seattle District Office and the Internal Revenue Service itself, contrary to the continual actions of its Washington lawyers in this case, went ahead nevertheless to ratify their findings clearing me, as shown in the true and correct copy of the Final Report covering the tax years 1986, 1987, and 1988, set forth in Exhibit "G".

18. Needless to say, after reviewing the lack of due process in my criminal tax case, having been tried without my tax files, the Hawaii Bar disciplinary authorities did not even wait for the Final Report of the Seattle IRS District Office, and completely vindicated me of any guilt whatsoever, refusing to impose any professional discipline upon me whatsoever on January 27, 1998, and I am told that that is the first time in American legal history that no discipline has been imposed upon an attorney convicted of federal failure-to-file crimes; indeed, the Hawaii Supreme Court rules themselves require such discipline automatically in such circumstances, as has been the case in Hawaii on several previous occasions in all other such situations.

19. Having been exonerated by my professional peers and now by the District management of the IRS itself, is it too much to ask that the federal judiciary display similar integrity, however belatedly, and set aside my fraudulent failure-to-file criminal convictions and refund to me at the very least the $131,685.71 wrongfully taken from me, with interest and attorney's fees?

20. There is, of course, no way that this Court can return to me a decade of my life ruined by this wrongful experience.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 11th day of November 2003, at Honolulu, Hawaii.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN

EXHIBIT "A"

Department of the Treasury
Internal Revenue Service

Problem Resolution Office

553-48-0554

Gary Victor Dubin 1040 1985 & 1986

Date: 12-20-88

Re: Your Inquiry Dated: 12-2-88

Dear Taxpayer.

We received your letter concerning Form 1040 for the tax periods ending December 31, 1985 and 1986. We have corrected our records to show that you are not required to file for 1985 and 1986 Form 1040. The reason this problem occurred is because your bank has the interest income as individual and it should be reported as business income. We apologize for the delay in responding and any inconvenience we may have caused.

Your Telephone Number:
( )

Best Time to Call During Normal Working Hours:

Sincerely,
Julia Morgan

Title:
Tax Examiner

Employee No.: 89725511

Form 5260-A (Rev. 7-87)

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

United States of America,	)	CR. NO. 93-1434
	)	
Plaintiff,	)	FINDINGS OF FACT
vs.	)	
	)	
Gary Victor Dubin,	)	
	)	
Defendant.	)	
	)	

FINDINGS OF FACT

1. Defendant GARY VICTOR DUBIN (DUBIN) was charged in an information filed August 13, 1993 for violations of 26 U.S.C. Section 7203 having failed to file his required Federal Income Tax Returns for the calendar years 1986, 1987 and 1988.

2. DUBIN was arraigned on August 27, 1993. He waived trial by jury in spite of the Magistrate judge's advice to the contrary and insisted on his decision to represent himself pro se.

3. After several continuances where DUBIN claimed he was too ill to proceed because of back problems, trial was finally set to begin on September 13, 1994 at 9:00 A.M.

4. On September 9, 1994 he again moved for continuance claiming for the first the he now wanted to be represented by counsel and that he was not prepared to proceed. Nor was his proposed counsel ready to proceed. The motion was denied. After denial of the motion on that same day DUBIN consulted a psychiatrist Dr. Marie-Louise deVegvar complaining of depression as the result of the death of his son some two years before. This was the first

time he had ever sought consultation for any mental condition.

5. On the evening of September 12, 1994 DUBIN committed himself to Queen's Medical Center complaining of back problems.

6. On the morning of September 13, 1994 the date set for commencement of trial, DUBIN failed to appear. The Court was advised that because of medical problems to his back DUBIN could not appear at trial. The Court ordered that DUBIN be examined at the hospital by a government doctor. Before this could be accomplished, the duty doctor at the hospital said DUBIN was being discharged because he had no physical disorder. The Court found that DUBIN was physically and mentally fit to participate in a non-jury trial and issued a bench warrant for his arrest.

7. The Court was further advised that DUBIN, immediately upon his discharge, had committed himself to the psychiatric side of Queen's Hospital because he was depressed about the trial and the death of his son.

8. His son had died over two years before. In the interim, from his son's death to September 12, 1994, DUBIN had engaged continuously in the practice of law and had received substantial fees for his legal work.

9. DUBIN had never seen a psychiatrist or been treated by any physician for his alleged depression until September 9, 1994. At the time the psychiatrist Dr. deVegvar did not feel he needed any hospitalization for his alleged depression.

THE TRIAL

10. On September 13, 1994 DUBIN was brought before the Court. Again DUBIN claimed he now wished to be represented by counsel and wanted a continuance for the purpose of letting his counsel prepare. The Court said counsel could participate but that no continuance would be granted. Counsel BENJAMIN CASSIDAY advised the

Court that although he had been consulted by DUBIN for the first time on September 9, 1994 he would not proceed as DUBIN'S counsel. Dr. deVegvar's letter dated September 9, 1994 was first presented to the Court after DUBIN had been brought to Court and trial commenced.

11. DUBIN complained that he did not have his records. Those were brought to him during the morning of September 13, 1994 by a friend, also a lawyer, and those records were available to DUBIN throughout the trial. During the trial DUBIN often referred to his records and what they contained.

12. Based on DUBIN'S demeanor and his lucidity, facility and intelligence in responding to the Court's inquiry prior to commencement of the proceedings, the Court found DUBIN mentally competent and physically fit to proceed to trial. The Court further finds that at all times throughout the trial, DUBIN was both mentally competent and physically fit to put on his defense. Moreover, the Court does not find credible the somewhat confusing and conclusory statements regarding DUBIN'S ability to perform at trial contained in Dr. deVegvar's September 9, 1994 letter especially in light of the fact that these unsupported conclusions were made after a single meeting. That single meeting did not result in DUBIN'S commitment to any hospital.

13. On September 13, 1994 at t h e hearing on DUBIN'S motion for a new trial, Dr. deVegvar testified that DUBIN called Dr. deVegvar the evening of September 12, 1994. Despite the absence of any new facts, Dr. deVegvar wrote a second letter dated December 22, 1994 and received by the Court only in connection with the motion for new trial filed by DUBIN. In light of all the circumstances surrounding DUBIN'S consultation with Dr. deVegvar and the testimony of Dr. deVegvar, the letters of September 9, 1994 and December 22, 1994 are not credible.

14. DUBIN'S failure to file a tax return for the years 1986, 1987 and 1988 was discovered by a Revenue Agent from the Examination Division of the Internal Revenue Service during the audit of his filed 1984 U.S. Individual

Income Tax Return Form1040. The audit of this 1984 return was initially opened in 1988 and was not completed until March 1990.

15. During the period May 1988 to March 1990 DUBIN failed to meet commitments to provide requested Information on more than 30 occasions. DUBIN claimed the urgency of higher priority items relating to his law practice prevented him from complying with the Revenue Agent's request for information.

16. After March 1990 the Revenue Agent expanded her examination to include an audit of DUBIN'S records to include the unfiled returns for 1985, 1986 and 1987.

17. DUBIN claimed t h a t the 1985, 1986 and 1987 returns had not been filed because he had not had taxable income in excess of $400 from his solely owned legal practice.

18. During each of the years 1985, 1966, 1987, and 1988 DUBIN was withdrawing from his bank accounts in the law practice sums in excess of the filing requirement to pay his non-deductible personal expenses, his son's college expenses, and the expenses necessary to the maintenance of his investments, real estate, and personal property.

19. DUBIN'S testimony that he had "huge losses" to offset his gross income was not credible. DUBIN never made any analysis of his records in any of the years 1985, 1986, 1987 or 1988. Nor did he present any corroborating evidence of these alleged losses.

20. On at least 10 occasions between May 1990 and March 1991, DUBIN failed to provide requested documentation of his expenses during 1985, 1986 and 1987. Only a partially completed schedule for 1985 expenses was finally filed on March 7, 1991.

21. During his trial DUBIN lucidly and thoroughly cross-examined the Revenue Agent Janet Nakasone concerning her audit; of his 1985 return and his 1986, 1987 and 1988 income.

22. DUBIN had gross business income of $533,725.39 in 1986, $633,594.38 in 1987 and $ 330,297.68 in 1988. After applying business deductions of $323,240.43 and non-business deductions of $10,504.67 for 1986; business deductions of $334,963.20 and non-business deductions of $13,843.43; and business deductions of $282,159.97 and non-business deductions of $14,161.17, DUBIN had $199,980.29 taxable income for 1986, $284,787.75 taxable income for 1987 and $33,976.54 taxable income for 1988 each requiring him to file tax returns for those respective years. Every doubt in these various determinations of taxable income were resolved in favor of DUBIN.

23. DUBIN was obviously aware of the requirement to file income tax returns. This was established by his having filed 1040's in 1984 and in other years that he had no income and by hid expressed knowledge of the $400 net income requirement on sole proprietorships. His claimed subjective belief that he was not required to file a return is not credible in light of the evidence at trial, particularly, but not limited to, the evidence concerning the vast amounts of money that had been deposited to his principal accounts and his conduct during the audit process.

24. DUBIN is a sophisticated attorney with a practice largely dedicated to complicated business litigation.

25. DUBIN knowingly and willfully failed to file his required tax returns for the years 1986, 1987 and 1988.

SENTENCING

26. DUBIN was convicted by verdict of the Court- on September 14, 1994.

27. Sentencing was set for January 9, 1995.

28. DUBIN was represented by counsel BENJAMIN CASSIDAY at the sentence hearing.

29. DUBIN was allowed allocution to present

mitigation and to make any objections he had to the presentence report.

30. DUBIN'S allocution was largely one of re-trying the case and maintaining his complete innocence to the charges upon which he was convicted.

31. DUBIN presented nothing that could be termed an acceptance of responsibility within the Sentencing Guideline Section 3E1.1.

32. Count One charged a crime not subject to the Sentencing Guidelines, since the violation occurred on August 15, 1987.

33. Counts Two and Three are subject to the Sentencing Guidelines.

34. DUBIN obstructed justice by his failure to appear at the time set for trial and requiring the court to issue an arrest warrant to provide his presence at trial. Defendant was neither mentally nor physically ill on September 12, 1994 or September 13, 1994 so as to prevent him for appearing at trial.

35. The violations charged in Court One, Two and Three are a continuing pattern of conduct permitting a single computation for the tax loss to be used pursuant to the Sentencing Guidelines Section lB1.3 (a)(2) on Counts Two and Three.

36. Financial statements prepared by DUBIN during 1986, 1987 and 1988 showed increases that corresponded to net income much in excess of the filing requirements of each year 1986, 1987 and 1988.

37. In 1986, 1987 and 1988 DUBIN filed reports of what are denominated gross receipts with the State of Hawaii that correspond to the governments gross income figures proved at trial.

38. The Guideline range for Counts 2 and 3 based a total offense level of 14 and criminal history points of 0 is fifteen (15) to twenty-one (21) months.

39. On Count 1 the Court chooses to exclude the 1986 tax lose from the guideline sentencing on Counts 2 and 3 and pursuant to Sentencing Guideline 2T1.2 (a) (2). The tax loss therefore on Counts 2 and 3 is for 1987, $643,032 - $20,000 x 10% = $62,303, and for 1988 $469,490 - $20,000 x 10% = $44,949, for a total loss of $107,252. The tax loss figures used here were proved at trial. The method of calculation was not disputed at sentencing.

CONCLUSION

40. DUBIN is guilty of failing to file his required tax returns for the years 1986, 1987, and 1988.

41. On Count One DUBIN 1 a committed to the custody of the Bureau of Prisons for a period of 12 months.

42. On Count Two DUBIN is committed to the custody of the Bureau of Prisons for a period of 12 months.

43. On Count Three DUBIN LB committed to the custody of the Bureau of Prisons for a period of 6 months.

44. On Count. One DUBIN is fined $25,000.

45. On Count Two DUBIN is fined $100,000.

46. On Count. Three DUBIN is fined $100, 000. The fines on Counts Two and Three only to run concurrently.

47. The custody sentences on Counts One, Two and Three shall run consecutive to each other.

48. Total custody sentence is 30 months.

49. The fines on Counts Two and Three shall be consecutive to Count One but concurrent with each other only for a total fine of $125,000.

50. DUBIN shall pay the cost of prosecution in the sum of $6,685.70.

51. The fines and costs of prosecution together with the penalty assessment of $75.00 shall be deducted from the cash bond presently on file with the clerk and paid to the

United States forthwith.

52. Defendant is placed on one year supervised release on each of Counts Two and Three to run concurrently on the following terms and conditions:

1. He obey all laws local, state and Federal.

2. He provide the Probation Office access to any requested financial information.

3. He cooperate with the Internal Revenue Service in the filing of all past due tax return8 and payment to all taxes owing.

53. DUBIN shall report directly to the institution designated for his imprisonment or in default thereof to the office of the United States Marshal at Honolulu, Hawaii by 12 Noon of January 30, 1995. The balance of the bond shall be exonerated upon surrender.

DATED: January 20, 1995.

/s/ Manuel L. Real

MANUEL L. REAL
United States District Court Judge

EXHIBIT "C"

U.S.S.G. § 2T1.2

Willful Failure To File Return, Supply Information, or Pay Tax

(a) Base Offense Level:

(1) 1 level less than the level from §2T4.1 (Tax Table) corresponding to the tax loss; or

(2) 5, if there is no tax loss.

For purposes of this guideline, "tax loss" means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000.

* * *

U.S.S.G. § 2T4.1

Tax Table

	Tax Loss (Apply the Greatest)	Offense Level
(A)	$2,000 or less	6
(B)	More than $2,000	7
(C)	More than $5,000	8
(D)	More than $10,000	9
(E)	More than $20,000	10
(F)	More than $40,000	11
(G)	More than $70,000	12
(H)	More than $120,000	13
(I)	More than $200,000	14
(J)	More than $350,000	15
(K)	More than $500,000	16
(L)	More than $800,000	17
(M)	More than $1,500,000	18
(N)	More than $2,500,000	19
(O)	More than $5,000,000	20
(P)	More than $10,000,000	21
(Q)	More than $20,000,000	22
(R)	More than $40,000,000	23
(S)	More than $80,000,000	24

EXHIBIT "D"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	CR. NO. 93-1434
	)	
Plaintiff,	)	Honolulu, Hawaii
vs.	)	Tuesday
	)	September 13, 1994
Gary Victor Dubin,	)	9:00 a.m.
	)	
Defendant.	)	Non-Jury Trial
_____	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

[PARTIAL TRANSCRIPT – PAGES 32-35, 106-107]

MR. OSBORNE: I have no further questions of this witness.

THE COURT : Cross-examination, Mr. Dubin?

MR. DUBIN: I 'm not prepared, Your Honor.

THE COURT: All right. Step down, Mr. Takahashi. Call your next witness.

MR. OSBORNE: Mr. Higuera.

(Pause)

MR. OSBORNE: The marshals have informed me, Your Honor, that it's their understanding that if Mr. Dubin were to write a note to an individual known as Sweeney, that his possessions would be released to the person he instructed that they be released to. He's an employee at the hospital

THE COURT: A pen and paper, Mr. Dubin. What we want you to do is write a note authorizing your friend to get your property from the hospital so he has the keys and then he can go get the exhibits which you left at home.

MR. DUBIN: Your Honor, I think I can best do that on the telephone.

THE COURT: No, write a note.

MR. DUBIN: What is the note to say, Your Honor?

THE COURT: That they' re to release your property to your friend.

MR. DUBIN: Oh, the hospital.

THE COURT: To a Mr. Sweeney.

MR. DUBIN: This is a note to the hospital?

THE COURT: Yes, uh-huh.

(Pause – defendant writing note)

MR. OSBORNE: Your Honor, might the marshal take a look at the note to see if that comports with his understanding of –

THE COURT: Yes, uh-huh. Surely.

MR. DUBIN: Your. Honor, can I say on the record that my ability to prepare at all at the trial of this nature would enable me to have access to my records, familiarity with my office files, and use of Lexis and Westlaw, hardly the kind of thing that would have at a jail lockup.

THE COURT: No, it's a little late for that, Mr. Dubin. You've had quite a long time to be able to prepare for this trial.

MR. DUBIN: Your Honor, I don' t feel I've ever had the opportunity to explain what I did.

THE COURT : Well, that's your own feeling. The evidence is to the contrary. - -

MR. DUBIN: Well, then the Court should make no pretense about putting the documents in front of me then, because there's nothing I can do in this short notice.

THE COURT: No, you had the documents at home and we will get the documents that you have at home and any

notes that you might have on them, and they will be delivered to the detention center so that you can do whatever you want with those documents.

MR. DUBIN: I have a great deal of materials there, no one could that easily find them.

THE COURT: Well, you can tell your friend exactly were they are and what materials you need and he'll bring them to you.

MR. DUBIN: Your Honor, for the short time that's left I don't know how effective that would be anyway.

THE COURT: Well, we'll give you time. Is that note okay?

MR. OSBORNE: Your Honor, the marshal suggests that the gentleman who was just at –

THE COURT: Yes.

MR. OSBORNE: -- the lectern, that his name be added to the note as well.

THE COURT: Yes, would you tell them who it is that is going to be able to pick that up, Mr. Dubin? So put his name on the note.

MR. DUBIN: Well, there's this color pen. I don't have that, I'll use another one.

(Pause - defendant writing note)

THE COURT: All right, sir, would you do that? Would you get that note and get those materials for Mr. Dubin? If you have to consult with him as to where they are you may do so right now so we can get this done.

MR. DUBIN: Your Honor, it would be necessary for Mr. Clement to call from my office -- from home and I

could show -- point him in the direction –

THE COURT: No, you just tell him where they are. I think he's probably familiar with your home.

(Pause)

MR. DUBIN: I urge the Court to consider the fact I wasn't running away from anything.

THE COURT: Yes, just from trial, sir. Okay.

MR. OSBORNE: I hate to complicate this, Judge, but I'm familiar with the area in which Mr. Dubin resides, and the marshal has just reminded me that a note from Mr. Dubin to the gate guard might also assist this gentleman in going through to the property, so perhaps we also need a second note to Haiku Plantation suggesting that --

THE COURT: Yes, you might do that so that he won't have any problems getting –

MR. DUBIN: Your Honor, that's not required.

THE COURT: -- into the plantation.

MR. DUBIN: That's not required. All they do is you say who --

THE COURT: All right, Mr. Clements, then if you will stop by the second floor to the clerk's office, get a copy made, and bring back a copy if you have to leave the original, or bring back the original --

THE CLERK: I can get one done for him right now.

THE COURT: All right. Clerk will do that for you. All right. Let's proceed with Mr. Takahashi's -- no cross-examination -- I'm sorry, your next witness.

* * * *

Mr. DUBIN: Your Honor, may I just say one other thing, please?

THE COURT : All right - .

MR. DUBIN: And –

THE COURT: 9:00 o'clock tomorrow morning, Mr. Dubin.

MR. DUBIN: Your Honor, may I just say one other thing, please?

The COURT: All right.

MR. DUBIN: For me to properly prepare this case I have to have access to a number of files, including the Bjerke Orchid Isle file --

THE COURT: Mr. Clements has gone to your house to get them --

MR. DUBIN: No, that's not in there, Your Honor.

THE COURT- -- and he can bring them to wherever the marshals are going to place you and take care of that problem .

MR. DUBIN: Your Honor, it's not in that area where I --

THE COURT: Well, Mr. Dubin, I can't help that. You had -- since January you've had all of these records with which to prepare for trial. Again, as I tell you, this is not the Burger King.

MR. DUBIN: Your Honor --

THE COURT: All right. 9:00 o'clock tomorrow morning. --

(Whereupon the hearing in the above-entitled matter was adjourned at 3:42 p.m., to reconvene on Wednesday, September 14, 1994, at 9:00 a.m.)

EXHIBIT "E"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	CR. NO. 93-1434
	)	
Plaintiff,	)	Honolulu, Hawaii
vs.	)	Friday
	)	January 13, 1995
Gary Victor Dubin,	)	10:03 a.m.
	)	
Defendant.	)	Sentencing
	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

[PARTIAL TRANSCRIPT – PAGES 35-37]

MR. DUBIN: - I was in the IRS office at the time. I told them what my belief was. If it was that wrong, why didn't they tell me I was wrong? If I was trying to hide something from them, then how come they acknowledged I told them and that I wrote them that? And this was before –

THE COURT: You were not in the IRS office until after you had not filed '86, '87 and '88 tax returns.

MR. DUBIN: All right. Your Honor, that is incorrect –

THE COURT: Well –

MR. DUBIN: - in the record and may -

THE COURT: No, I don't propose you to show me that.

MR. DUBIN: All right. Well, then just – that should be marked then in the transcript, because I gave them my check registers early on. They had – before '87 and '88, they had all the information, and I had told them that. And I told the IRS that. And Janet Nakasone acknowledged that in the trial and it's also in the exhibits. And as I say, I didn't have all my letters to the IRS, because I didn't have them on my- I didn't have them because I was in jail. Now, I do have them on my desk, Your Honor. Could I admit them –

THE COURT: No.

MR. DUBIN: - could I admit them into the record here?

THE COURT: No, you can't admit them into the record. We're not trying the case now. That's been tried and the record has been made, Mr. Dubin.

(Pause)

MR. DUBIN: Well, then all I could say is that the record reflects accurately what I said, because I believe Janet Nakasone testified to that. And the other evidence, I'm sorry I didn't have – I didn't have whatever is not in the record there, because I was locked up in jail and I was unable to get my files. So –

THE COURT: Mr. Dubin, don't do that. The files were brought to you.

MR. DUBIN: Your Honor, not all my files were brought –

THE COURT: By your friend.

MR. DUBIN: - were brought to me. The were brought to me –

THE COURT: Well, you say that, you say that, but there is no indication of it. There was no indication of it in the record.

MR. DUBIN: Your Honor –

THE COURT: Please, Mr. Dubin, I don't –

MR. DUBIN: All right.

THE COURT: - I don't want to argue with you.

MR. DUBIN: All right. I just want –

THE COURT: You are now talking to mitigation. So please do that.

MR. DUBIN: I point out that I have the records here. I can provide them, if asked. All right. In mitigation, there is no loss to the government. They could have assessed me at any time. They say they intended to do that. They don't do that, I suppose, because they did that, then I could sow there was no loss. This is a – this is a scheme, a statutory scheme that I believe was not intended to apply to someone in my situation, that provides vast abuses, and I am caught in this. And Apparently, Your Honor has already concluded – has already judged – prejudged or after-judged or judged my conduct, and I guess there's nothing else I can say.

THE COURT: All right, Mr. Dubin. Fine. Mr. Peyton, what's your position on the guideline aspects?

MR. PEYTON: Your Honor, the maximum sentence the court can impose under the guidelines –

EXHIBIT "F"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	No. CR-93-01434 MLR
	)	
Plaintiff,	)	DECLARATION OF JAMES
vs.	)	W. CLEMENT
	)	
Gary Victor Dubin,	)	January 21, 1997
	)	Non-Hearing Motion
Defendant.	)	
	)	

DECLARATION OF JAMES W. CLEMENT

I, JAMES W. CLEMENT, DECLARE:

1. I have been a member of the Bar of the State of Hawaii since 1982, and in that year was also admitted to practice law in the United States District Court.

2. I currently reside in Ithaca, New York. I make the following statements of fact of my own personal firsthand knowledge, and if requested I am willing to attend an evidentiary hearing to testify in person concerning the matters described herein.

3. I first met Mr. Gary Victor Dubin when both of us worked at the law firm of Mukai, Ichiki, Raffetto & MacMillan in Honolulu, beginning in late 1982. In 1984 my wife (also a member of the Hawaii Bar) and I left for New York, and never had any contact with Mr. Dubin until the events described herein which took place in 1994.

4. In mid-1994, I was considering returning to practice law in Hawaii, and I telephoned attorneys whom I had known at the Mukai firm previously, including Mr.

Dubin, and through those conversations learned of his tax case. In conjunction with my possible relocation back to Hawaii, I returned to Honolulu at the end of the summer in 1994, and I sat as a visitor at Mr. Dubin's tax trial on both days, September 13 and 14, 1994, Judge Manuel Real presiding.

5. During both days of trial I sat in the audience in the visitors' section immediately behind Mr. Dubin who was located at the Defendant's table; he had no counsel and was sitting alone. I was there the entire time, except when Judge Real sent me to Mr. Dubin's residence to pick up his case and tax files.

6. At the start of trial, the morning of September 13, 1994, when Mr. Dubin appeared in the courtroom in handcuffs, taken from the Hospital by two U.S. Marshals, I watched two witnesses testify, briefly authenticating documents, and then, when Mr. Dubin complained that he did not have any of his case files with him, having been taken directly to the courtroom from the Hospital, the Assistant U.S. Attorney, Mr. Osborne, told the Judge that I was a friend of Mr. Dubin, that I was in the audience, that I knew where Mr. Dubin lived, and that I could get Mr. Dubin's case files for him.

7. The next thing I knew Judge Real called me to the podium and instructed me to get Mr. Dubin's files for him. Attached within Exhibit "A" to this Declaration are the relevant pages from the trial transcript of September 13, 1994, which I have asked Mr. Dubin to fax to me to review in preparing this Declaration; in those pages is an accurate record of what happened [see prior exhibits]. I left the courtroom at that time, about 1:30 p.m., went to Mr. Dubin's house, which was on the other side of the Island, forty minutes away, found two boxes of materials that appeared to be related to the tax case, and returned that day after the trial had adjourned, at approximately 5:00 p.m.

8. When I reached the courthouse, Mr. Dubin was gone, apparently taken to Halawa prison for the night. I

inquired at the U.S. Marshal's office in the courthouse whether I could bring the case materials to Mr. Dubin, and I was told that I could not since I was not his attorney. I was instructed by the Judge's clerk to leave the case materials with them and that they would give them to Mr. Dubin the next morning for the second day of trial. I observed the next morning that these boxes were sitting on the Defendant's table before he arrived that day to the courtroom. Only later during the trial did I discover from Mr. Dubin that I had brought to him only a duplicate set of the Government's Exhibits and none of his case or tax files.

9. In preparing this Declaration, I requested copies of various documents from Mr. Dubin having to do with my involvement at the trial; Mr. Dubin has faxed to me Judge Real's Findings of Fact, for instance, which I had never before seen. In Finding No. 11, Judge Real states that Mr. Dubin had his records "brought to him the morning of September 13, 1994 by a friend, also a lawyer, and those records were available to DUBIN throughout the trial". The pertinent parts of those Findings are included within Exhibit "C" hereto. I know of my own personal firsthand knowledge that Finding of Fact No. 11 is absolutely false.

10. Returning to the courtroom on September 14, 1994, I listened to and observed the oral testimony of three Government witnesses that final day of Mr. Dubin's trial: Mr. Chong (IRS Criminal Investigation Division Special Agent), Ms. Nakasone (Mr. Dubin's IRS Examiner), and Mr. Bain (IRS Revenue Agent). Mr. Dubin was obviously ill, but tried nevertheless due to the obvious importance of those two witnesses, to cross-examine Ms. Nakasone and Mr. Bain extensively. The order of witnesses on September 14, 1994, is shown in the trial transcript for that day; the relevant pages of the transcript are set forth within Exhibit "B" hereto.

11. During Mr. Dubin's cross-examination, I observed Assistant U.S. Attorney, Mr. Osborne, sitting at the prosecution's table, continually shaking his head up and down, coaching the Government witnesses how to answer Mr. Dubin's questions. Mr. Osborne's head shaking was

clearly visible to the witnesses, must have been noticed by Judge Real, and should have been seen by many in the audience as well. Mr. Dubin, however, facing the witnesses, was not in a position to see Mr. Osborne instructing the witnesses.

12. I observed the Government witnesses testify exactly as Mr. Osborne gestured to them, in what appeared to be a rehearsed procedure. I am not a trial lawyer; I thought the procedure was very unfair, but the entire trial was conducted by Judge Real in my opinion in a very unfair manner, which even overshadowed in my mind what the prosecutor was doing with his witnesses.

13. When the trial was completed, I immediately returned to New York, bewildered by what I had seen. I have never spoken with Mr. Dubin since the trial, until late October of this year when I had heard from attorneys in Honolulu that Mr. Dubin had returned from prison, and I telephoned him and first told him about the conduct of the Assistant U.S. Attorney, Mr. Osborne, at his trial, at which time he requested that I prepare this Declaration to inform the Court of my observations of the conduct of the prosecutor during his cross-examination of Government witnesses, and I have given the Court also my knowledge as to the falsity of Finding of Fact No. 11 as well as an officer of the Court and in the interest of justice.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10th day of December, 1996, at Ithaca, New York.

/s/ James W. Clement

JAMES W. CLEMENT

Form 4549 — Department of the Treasury - Internal Revenue Service

Income Tax Examination Changes

Name and Address of Taxpayer	SS or EI Number	Return Form No:
GARY V. DUBIN 900 Fort Street Mall Suite 1410, Pioneer Plaza Honolulu HI 96813	553-46-0554	1040

Person with whom examination changes were discussed: — Name and Title:

1. Adjustments to Income	Period End 12/31/1995	Period End 12/31/1996	Period End 12/31/1997
a. Itemized Deductions	1,015.00	(157.00)	
b. Schedule C Gross Business Income	73,401.00	28,710.00	927.00
c. SCH C BUS DEDUCTIONS	38,351.00	134,263.00	75,281.00
d. NOL Carryback/Carryforward	(62,160.00)	62,365.00	329,782.00
e. Other Income		(131,056.00)	
f.			
g.			
h.			
i.			
j.			
k.			
l.			
m.			
n.			
o.			
p.			
2. Total Adjustments	64,079.00	76,125.00	405,990.00
3. Taxable Income Per Return or as Previously Adjusted	(67,864.00)	(347,490.00)	(467,593.00)
4. Corrected Taxable Income	(3,785.00)	(272,389.00)	(61,743.00)
Tax Method	TAX TABLE	TAX TABLE	TAX TABLE
Filing Status	Head of Household	Single	Single
5. Tax	0.00	0.00	0.00
6. Additional Taxes / Alternative Minimum Tax			
7. Corrected Tax Liability	0.00	0.00	0.00
8. Less Credits a.			
b.			
c.			
d.			
9. Balance (Line 7 less total of lines 8a through 8d)	0.00	0.00	0.00

1. Adjustments to Income	Period End 12/31/1998
a. Itemized Deductions	(6,870.00)
b. NOL Carryback/Carryforward	430,636.00
c. Schedule C Gross Business Income	7,459.00
d. SCH C BUS DEDUCTIONS	62,327.00
e. SE AGI Adjustment	
f.	
g.	
h.	
i.	
j.	
k.	
l.	
m.	
n.	
o.	
p.	
2. Total Adjustments	494,344.00
3. Taxable Income Per Return or as Previously Adjusted	(497,484.00)
4. Corrected Taxable Income	(3,140.00)
Tax Method	TAX TABLE
Filing Status	Single
5. Tax	0.00
6. Additional Taxes / Alternative Minimum Tax	
7. Corrected Tax Liability	0.00
8. Less Credits a. General Business Credit	
b.	
c.	
d.	
9. Balance (Line 7 less total of lines 8a through 8d)	0.00

Examiner's Signature: Fred L. Bridges — Employee ID: 9100224 — Office: Seattle — Date: 06/30/2003

Consent to Assessment and Collection – I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in the United States Tax Court the findings in this report. Therefore, I give my consent to the immediate assessment and collection of any increase in tax and penalties, and accept any decrease in tax and penalties shown above, plus additional interest as provided by law. It is understood that this report is subject to acceptance by the Area Director, Area Manager or Director of Field Operations.

PLEASE NOTE: If a joint return was filed, BOTH taxpayers must sign

Signature of Taxpayer	Date	Signature of Taxpayer	Date
X [signature]	X 7/10/03		
By:	Title		Date

RGS Version 4.00.00

Form CG-4549

EXHIBIT "G"

A86

3. Memorandum Opinion And Order, Filed January 28, 2004, In The United States District Court For The District Of Hawaii

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

GARY VICTOR DUBIN, Plaintiff, vs. MANUEL L. REAL, individually; THE INTERNAL REVENUE SERVICE; THE UNITED STATES OF AMERICA; LESLIE E. OSBORNE, JR., individually; JOHN F. PEYTON, JR., individually; CHARLES BANFE, individually; DAVID ALAN EZRA, individually; BANK OF HAWAII; JOHN CANDON, individually; WALTER A. Y. H. CHINN, as Clerk of the United States District Court for the District of Hawaii; and THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT, Defendants.	CV. NO. 03-00058 MEMORANDUM OPINION AND ORDER The Honorable Marvin E. Aspen, District Judge

MEMORANDUM OPINION AND ORDER

This is the latest in a series of legal actions by Plaintiff Gary Dubin against a group of governmental and non-governmental entities for their alleged actions in two unrelated cases. Dubin filed the present complaint charging fraud upon the court[1] in relation to his criminal convictions for three misdemeanor counts of failure to file income taxes and the imposition of Rule 11 sanctions upon him in another, unrelated case. He seeks a wide range of remedies, including: 1) reversal of his criminal convictions; 2) monetary sanctions against many of the participants in his criminal trial, including presiding District Court Judge Manuel L. Real, Chief District Court Judge David Alan Ezra,[2] Assistant United States Attorneys John Peyton and Leslie Osborne, Internal Revenue Service ("IRS") investigator Charles Banfe, the IRS, and the United States; 3) reversal of the decision to impose Rule 11 sanctions upon

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[1] Several of the defendants interpreted Dubin's complaint as stating a cause of action pursuant to *Bivens v. Six Unknown Named Defendants*, 403 U.S. 388 (1971), and under the Federal Tort Claims Act, 28 U.S.C. 59 2671-80. In his responsive pleadings, Dubin clarified that his sole cause of action is one for fraud upon the court. At oral argument, the defendants therefore requested that the court disregard their arguments, made in their motions to dismiss, that the complaint should be dismissed for failure to comply with the pleading requirements of *Bivens* and the Federal Tort Claims Act. We thus do not address defendants' assertions with regard to those two causes of action and focus solely on the issue of whether Dubin has stated a claim for fraud upon the court.

[2] Ezra became chief judge on November 30, 1998. In this opinion, he is referred to as Chief Judge Ezra when referencing the actions he allegedly took after that date. We refer to him as Judge Ezra in connection with his actions taken prior to November 30, 1998.

him; 4) monetary sanctions against Chief Judge Ezra, who imposed the Rule 11 sanctions upon Dubin; and 5) a mandatory injunction ordering the Judicial Council of the Ninth Circuit to investigate Dubin's charges of misconduct against Judges Real and Ezra. Finally, although he does not allege any specific wrongdoing against them, Dubin named the Bank of Hawaii ("BOH") and Bankruptcy Trustee John Candon as defendants[3] in the present complaint because they received the proceeds of the Rule 11 sanctions that Dubin wishes to have overturned.[4]

The defendants have filed four separate motions to dismiss Dubin's complaint. Those motions were filed by: 1) Judge Real and Chief Judge Ezra, Leslie Osborne, John Peyton, the United States, and the Judicial Council of the Ninth Circuit (the "federal defendant"); 2) the IRS and IRS Agent Charles Banfe (the "IRS defendants"); 3) the Bank of Hawaii; and 4) Bankruptcy Trustee John Candon. For the reasons set forth below, we grant all four of the motions to dismiss and dismiss Dubin's complaint in its entirety.[5]

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[3] The indiscriminate joinder of diverse and unrelated defendants in the present action, particularly in the cases of the Bank of Hawaii and John Candon, who have no stake in the outcome of the underlying litigation, is particularly disturbing and perhaps demonstrative of Dubin's approach to the practice of law.

[4] Dubin's complaint also sought an injunction against Walter A.Y.H. Chinn, Clerk of the United States District Court for the District of Hawaii ordering him to return the cash bond that Dubin had posted to satisfy his Rule 11 sanctions. The claim with respect to Chinn has since been dismissed and thus is not discussed here.

[5] On November 11, 2003, Dubin filed a motion to set aside his criminal convictions for failure to file tax returns and for reimbursement of the monetary penalties imposed

BACKGROUND

For the purpose of a motion to dismiss, we accept all well-pled allegations as true. *Zimmerman v. Oregon Dept.* of Justice, 170 F.3d 1169, 1 171 (9th Cir. 1999). We therefore recite the facts as Dubin presents them in his complaint.[6] We note, however, that in considering a motion to dismiss, a court may also take judicial notice of matters of public record, including submissions to, proceedings of, and opinions of other federal courts. *Emrich* v. *Touché Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988).

Although many of Dubin's claims overlap, we begin by presenting the facts relating to Dubin's criminal convictions separately from those relating to the subsequent imposition of Rule 11 sanctions against him in an unrelated civil case. We present a rather detailed version of the procedural posture of both of these cases to provide some

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upon him in relation to his criminal conviction. Because we dismiss Dubin's complaint in its entirety, that motion is now moot. We note, however, that there is little difference between the allegations made in this motion and the allegations made in Dubin's complaint. Were we to address the merits of this motion, the motion would be denied on the same grounds as those set forth in this opinion.

[6] Because of our restatement of the serious charges against jurists and other respected government officials named in this case, we emphasize that, although we are reciting Dubin's allegations as true solely for the purposes of this motion to dismiss, this opinion should not be read to infer that this court has found any of plaintiffs broad allegations of impropriety as having any merit whatsoever. The facts set forth in the complaint, as repeated in this opinion, are, of course, *allegations*, even when not so specifically labeled each and every time.

insight into the long history of the present action and of Dubin's general approach to litigation.

I. Dubin's Criminal Convictions

In 1993. Dubin was charged with three misdemeanor counts of willful failure to file tax returns for the years 1986, 3987, and 1988. (Compl. ¶ 3.) Dubin originally waived his right to a jury trial based on an implied agreement that Magistrate Judge Barry Kurren would preside over his bench trial. Shortly before trial, however, the case was reassigned to Judge Manuel L. Real, a visiting district court judge from the Central District of California. (Compl. ¶ 21.) Dubin charges that Judge Ezra, with whom Dubin claims he had had an "acrimonious relationship" for ten years, purposely "steered" Dubin's case to Judge Real. (Compl. ¶ 118.)

Dubin, an experienced trial lawyer, represented himself during the course of his criminal proceedings. His trial was originally set for January 11, 1994. Criminal Docket, Case No. 93-CR- 1434 (D. Haw.). The trial date was reset for May 3, 1994 to accommodate Dubin when he reported that he would be out of town on the original trial date. *Id.* The trial again was continued to August 2. 1994, then again to August 8, 1994, and finally to September 13, 1994. Id. Dubin filed motions for further continuances on August 29, 1994 and on September 12, 1994, but both motions were denied. Id. On September 12, 1994. the day before his scheduled trial date, Dubin went to his doctor, who arranged to have him hospitalized due to back pain and depression. (Compl. ¶ 35.) Despite Dubin's condition, Judge Real ordered that he be arrested and brought to court from the hospital. (Compl. ¶ 4.) Dubin alleges that he learned only after his trial, but prior to sentencing, that Assistant United States Attorneys Osborne and Peyton had, through ex *park* communications, informed Judge Real that Dubin was faking his illness. (Compl. ¶ 22.) Specifically, it is alleged that Osborne and Peyton told Judge Real's law clerk that they had

spoken to Dr. Wakuzawa, the doctor on duty at the hospital, that Dr. Wakuzawa had informed them that Dubin had checked himself into the hospital, and that he had no medical condition that required hospitalization. (Compl. ¶ 23.) Dubin further alleges that this information was false. He states that it was not Dr. Wakuzawa, but rather Dr. Marie-Louise deVegvar who was treating Dubin at the time. Furthermore, Dr. Wakuzawa later provided Dubin with an affidavit stating that he never told anyone that Dubin had checked himself into the hospital. (Compl. ¶ 25.) Dubin states that Osborne and Peyton also spoke to Dr. deVegvar about Dubin's condition, but that they failed to reveal the details of that conversation to Judge Real's law clerk. (Compl. ¶ 39.)

Per Judge Real's orders, Dubin was arrested and brought to trial directly from the hospital. Although aware that Dubin had been brought into court from the hospital, Judge Real allegedly refused to conduct a sufficient inquiry into the effects of Dubin's medical condition, the medication he was taking, or his ability to represent himself at trial. (Compl. ¶ 29.) Despite this refusal, Dubin states that Judge Real later stated on the record that he had thoroughly examined Dubin's mental and physical health before proceeding to trial. (Compl. ¶ 29.)

Dubin was in custody from the time he was arrested at the hospital through the completion of his trial. He therefore did not have many of the documents and materials that he had prepared for trial and made several requests for access to this information. (Compl. ¶ 27.) Judge Real refused to release Dubin from custody, but he sent Dubin's colleague, James Clement, to Dubin's home to collect the case files. Judge Real assured Dubin that the materials would be brought to him the evening after the first day of trial. (Compl. ¶ 28.) Dubin alleges that he never received his case files.

Following his 1994 trial, Dubin was found guilty on

all three misdemeanor counts of failure to file tax returns, sentenced to thirty months in prison followed by one year of supervised release, and fined $125,000 plus $6,685.70 for the cost of his prosecution. Dubin spent nearly twenty months in prison and has completed his sentence. (Compl. ¶¶ 7-8.) As a result of his convictions, Dubin states that he lost all of his law practice and virtually all of his life savings.[7]

On review, the Ninth Circuit affirmed Dubin's convictions and denied Dubin's petitions for rehearing and rehearing en bane. United States *v.* Dubin, 77 F.3d 490 (Table), No. 95-1 0040, 1995 WL 764141 (9th Cir. 1995). The United States Supreme Court also denied Dubin's petition for a writ of certiorari, Dubin v. United States, 519 U.S. 872 (1996), and his petition for leave to file for rehearing, Dubin 17. United States, 519 U.S. 1102 (1997).

In 1995, while the Ninth Circuit decision was pending, Dubin allegedly learned from a friend that "there was a District Judge from Hawaii that was poor-mouthing Plaintiff to Judge Poole." (Compl. ¶ 87.) Judge Poole was a Ninth Circuit judge who sat on one of the panels which affirmed Dubin's convictions. (Compl. ¶ 87.) Dubin believes that the district judge who allegedly "poor- mouthed" Dubin was Judge Ezra. (Compl. ¶¶ 88, 118.)

Upon Dubin's release from prison in 1996, James Clement, the person assigned to bring Dubin's case files to him at trial, provided Dubin with an affidavit confirming that, on the second day of Dubin's trial, Clement had accidentally brought Dubin a duplicate set of the government's exhibits, rather than the files Dubin had

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[7] However, it should be noted that Dubin did not lose his license to practice law as a result of his criminal convictions and that Dubin indicated during oral argument that he has resumed his law practice with some success.

prepared for trial. (Compl. ¶ 54.) Dubin claims that this affidavit confirmed for the first time that he was tried without his case files.[8] Despite the fact that Dubin did not receive his files during trial (and that Clement did not even bring the wrong files until the second day of trial), Judge Real wrote in his findings of fact that Clement brought Dubin's files to court on the morning of Dubin's first day at trial. (Compl. ¶ 28.) In his 1996 affidavit, Clement claims that, "[i]n Finding of Fact No. 11, Judge Real states that Mr. Dubin had his records 'brought to him the morning of September 13, 1994 by a friend, also a lawyer, and those records were available to Dubin throughout the trial' . . . I know of my own personal firsthand knowledge that Finding of Fact No. 11 is absolutely false." (Compl. ¶ 54.) Clement also told Dubin for the first time in 1996 that Assistant United States Attorney Osborne had been giving government witnesses hand signals during Dubin's cross-examinations at trial. (Compl. ¶ 94.) Dubin was unable to obtain this information earlier because he was not allowed to speak with Clement during the trial. (Compl. ¶ 95.)

Once he obtained Clement's affidavit regarding the case files and the hand gestures, Dubin filed a motion requesting a new trial and seeking Judge Real's disqualification from any further proceedings in the case. (Compl. ¶ 96.) Judge Real denied the motion. His decision was affirmed by the Ninth Circuit in 1998. *See United States v. Dubin*, 133 F.3d 929, No. 97-10161, 1998 WL 4734 (9th Cir. 1998). The Ninth Circuit denied Dubin's requests for rehearing and rehearing *en banc* and the United States

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[8] We note, however, that although Dubin made several requests for his files on the first day of his trial, he never complained during the second day of trial about the fact that the wrong files had been brought to him. In fact, he never raised this complaint at all until 1996.

Supreme Court denied Dubin's writ of certiorari on the motion. *Dubin v. United States,* 525 U.S. 870 (1998). The Supreme Court also denied Dubin's subsequent request for rehearing. *Dubin* v. United *States, 525* U.S. 1137 (1 999).

The IRS eventually conducted an extensive six-year audit of Dubin's finances and, on December 6, 2002, concluded that Dubin had no taxable income for the three years for which he was convicted of failing to file income tax returns. (Compl. ¶ 10.) There is no question, however, that Dubin did not file tax returns in the years for which he was convicted of willful failure to file.

11. Rule 11 Sanctions

In 1997, after he was released from prison and had returned to the practice of law, Dubin represented Dr. Allan Ryo Kunimoto and Mrs. Jean Mieko Kunimoto in a state court action brought against them by the Bank of Hawaii ("BOH"). (Compl. ¶ 103.) The First Circuit Court of Hawaii entered a judgment in favor of BOH. Prior to judgment in that case, however, the Kunimotos filed a voluntary Chapter 11 bankruptcy petition. The bankruptcy court appointed John Candon as trustee of the Kunimoto bankruptcy estate. After losing in state court, 'Mr. Kunimoto, through Dubin and his co-counsel, filed a lawsuit against BOH and Candon in federal court. (Compl. ¶ 105.) The case was assigned to Judge Ezra.

The Bank of Hawaii, Candon, and other named defendants responded to the federal complaint with a request for Rule 11 sanctions on the grounds that the complaint lacked merit and that it was an attempt at re-litigating issues that had already been decided in the state court action. During the safe harbor period provided by Rule 11, Dubin offered to dismiss the complaint *without* prejudice because his clients refused to allow Dubin to dismiss the complaint *with* prejudice. (Compl. ¶¶ 138-39.) Nonetheless, Chief Judge Ezra imposed Rule 11 sanctions.

In his sanctions order, Chief Judge Ezra concluded that the meritless complaint filed in the Kunimoto action raised the same claims that had been denied in state court, that Kunimoto clearly lacked standing to bring the suit, and that the parties had not obtained the permission of the bankruptcy trustee to bring suit in federal court, as was required by law. *Kunimoto* v. *Fidell,* No. *98*-00453 (D. Haw. 1998). Chief Judge Ezra, pointing to cases unrelated to the Kunimoto action, further concluded that the complaint constituted part of a "long-standing pattern of litigious misconduct" on Dubin's part. (Compl. ¶145.)

According to Dubin's complaint in the present action, the only evidentiary basis for the court's conclusion that Dubin had engaged in a pattern of litigious misconduct was a fax sent by Dubin to one of his clients (in a case unrelated to the Kunimoto action). In the fax, Dubin described to the client his strategy of harassing the opposing party by running up that party's legal fees.[9] Chief Judge Ezra allegedly refused to investigate the circumstances surrounding this fax. Had he done so, Dubin claims that Chief Judge Ezra would have discovered that he was misinterpreting Dubin's statements. (Compl. ¶¶ 150-51.) Dubin also alleges that Chief Judge Ezra ignored other faxes sent by Dubin to his

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[9] Specifically, the fax stated that, "[i]n my opinion, what BOH is most worried about is how much it will cost them in costs and fees fighting me . . .yet the judges in federal court are frankly ignorant of the current fee and cost realities and put attorneys to impossible record keeping tasks to prove fees. Thus, Liberty Bank lost more than $30,000 fighting us in the foreclosure, plus vast interest for four years of foreclosure delays by me --that is why I am getting settlement offers routinely in my foreclosure cases." See Order Granting Defendants' Motion for Sanctions, Nos. 98-00453 & 98-00475 (D. Haw. Dec. 7, 1998).

clients in which he urged them to settle their cases before fees got any higher on either side. (Compl. ¶ 152.)

Chief Judge Ezra issued the order granting Rule 11 sanctions on December 7, 1998. On December 21, 1998, Dubin filed a motion to reconsider the sanctions order and to disqualify Chief Judge Ezra from all further proceedings on the issue. In that motion, Dubin claimed that, a decade earlier, he had represented a former client of Ezra's in a legal malpractice action against Ezra. (Compl. ¶ 118.) Dubin argued that Chief Judge Ezra should recuse himself from the Rule 11 proceedings because of bias stemming from the earlier malpractice action.

On December 22, 1998, the day after Dubin's motion was filed, Chief Judge Ezra held a hearing to consider the issue of disqualification. At that hearing, Chief Judge Ezra indicated that he would assign the motion to disqualify to another judge. See Order Granting Motion to Have Another Judge Hear Disqualification Motion, Nos. 98-00453 & 98-00475 (D. Haw. Dec. 22, 1998). Dubin objected, stating that Chief Judge Ezra should not be allowed to choose the judge who would decide the disqualification motion. *Id.* Chief Judge Ezra, "[i]n order to avoid even the appearance of impropriety," therefore designated District Court Judge Alan C. Kay to assign the motion to disqualify to another judge for disposition. Judge Kay then referred the disqualification issue to District Judge Martin Pence. On December 30, 1998, Judge Pence denied the motion because the bulk of the legal malpractice claims that had been brought by Dubin's client were against Judge Ezra's law firm and not against the judge himself. (Compl. ¶119.)

On January 14, 1999, Dubin filed a motion for reconsideration of Judge Pence's decision. That motion was denied. *See* Denial of Motion for Reconsideration. Nos. 98-00453 & 98-00475 (D. Haw. Jan. 20, 1999). On the same day that Judge Pence issued his decision, Dubin filed a

supplemental declaration in support of his disqualification motion. Judge Pence therefore issued a second ruling also denying the motion for reconsideration in light of Dubin's supplemental declaration. *See* Ruling on the January 20. 1999 Supplemental Declaration of Gary Victor Dubin in Further Support of Motion by Plaintiffs Attorney for Reconsideration, Nos. 98-00453 & 98-00475 (D. Haw. Jan. 27, 1999).

On February 4, 1999, after Judge Pence's decision to deny disqualification of Chief Judge Ezra, Chief Judge Ezra denied Dubin's motion for reconsideration of the sanctions order. *See* Order Denying Plaintiffs' Motions for Reconsideration of Sanctions, Nos. 98-00453 & 98-00475 (D. Haw. February 4, 1999).

Chief Judge Ezra's sanctions order referred the determination of the appropriate amount of sanctions to Magistrate Judge Francis Yamashita, acting as a special master. Dubin alleges that Judge Yamashita was under Chief Judge Ezra's influence and control. (Compl. ¶ 156.) Judge. Yamashita's first report recommended a fine of close to $100,000. Upon Dubin's motion, however, Chief Judge Ezra vacated the report on the grounds that Dubin was not informed of the magistrate judge's briefing schedule and thus failed to file timely objections to the other parties' submissions. Order Granting Plaintiffs' Attorneys' Joint Ex Parte Motion and Vacating the Special Master's Reports, Nos. 98-00453 & 98-00475 (D. Haw. June 29, 1999). Even though Chief Judge Ezra granted Dubin's motion. Dubin *still* filed a motion for partial reconsideration, stating that the fifteen days given to respond to Candon and BOH's fee submissions were insufficient. The court rejected this contention. In the same order, however, it granted Dubin's request for an evidentiary hearing on the issue of calculating attorneys' fees, even though Chief Judge Ezra noted that it was an unusual measure. Finally, Chief Judge Ezra denied Dubin's motion to disqualify Magistrate Judge Yamashita as

special master, declaring Dubin's assertions that Magistrate Judge Yamashita had "already made up his mind" regarding the amount of attorneys' fees were unsubstantiated. Order Granting in Part and Denying In Part Plaintiffs' Attorneys' Motion for Partia.1 Reconsideration, Nos. 98-00453 & 98-00475 (D. Haw. July 16, 1999).

The evidentiary hearing on the issue of the amount of sanctions was set for August 19, 1999. On August 16, 1999, Dubin moved to continue the hearing on the grounds that he had filed a motion to strike the sanctions order entered by Chief Judge Ezra. Magistrate Judge Yamashita denied the motion to continue because Chief Judge Ezra had already denied Dubin's motion for reconsideration. Order Denying Ex Parte Motion to Continue August 19, 1999 Evidentiary Hearing, Nos. 98-00453 & 98-00475 (D. Haw. Aug. 18. 1999).

Magistrate Judge Yamashita filed his final report on September 20, 1999. Dubin responded with formal objections to the report and another motion to disqualify the special master. The motions were denied. Order Denying Motion to Disqualify the Special Master, Nos. 98-00453 & 98-00475 (D. Haw. Jan. 5.2000). Dubin then filed a "Non-Hearing Motion for Rehearing of Renewed Motion for Rule 53(e)(2) Oral Hearing and to Disqualify Special Master, to Strike Special Master's Report, and to Discharge Special Master." Again, the court denied Dubin's motion. Order Denying Plaintiffs Non-Rearing Motion, Nos. 98-00453 & 98-00475 (D. Haw. Jan. 6, 2000).

Chief Judge Ezra entered his final sanctions decision on January 18.2000, ordering Dubin and his co-counsel to pay $40,497.41 to Candon and $76.364.91 to BOH. Dubin appealed the order to the Ninth Circuit Court of Appeals. His appeal was denied, as were his subsequent petitions for rehearing and rehearing *en banc, Kunimoto v.* Fidell, 26 Fed. App. 630,2001 WL 1480656 (9th Cir. 2001). After the denial

of his appeal, Dubin again applied to the Ninth Circuit for a writ of mandamus. The Ninth Circuit denied the petition and ordered that, "[no motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket." *Kunimoto v. Fidell,* Nos. 98-00453 & 98-00475 (9th Cir. May 29, 2002).

Dubin appealed the matter twice to the United States Supreme Court, which twice declined to issue a writ of certiorari. *See Dubin* v. *Bank of Hawaii,* 537 U.S. 943 (2002). A final order lifting the stay on the bond held to satisfy the sanctions was issued on February 14, 2003.

Dubin filed the present action on February 10, 2003, charging that the Rule 11 sanctions and his criminal convictions should be vacated based on fraud upon the court.

ANALYSIS

We are presented with motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(l) for lack of subject matter jurisdiction, 12(b)(2) for lack of personal jurisdiction, l2(b)(4) for insufficiency of process, and 12(b)(6) for failure to state a claim upon which relief can be granted. We address each of these bases in turn.

I. Subject Matter Jurisdiction over Dubin's Criminal Convictions

Federal Rule of Civil Procedure 12(b)(l) allows a party to challenge a court's subject matter jurisdiction over a claim. The federal defendants argue that this court lacks subject matter jurisdiction over Dubin's fraud upon the court claims insofar as they relate to his criminal convictions. We must address this question first because, where a motion to dismiss is based on more than one ground, as it is here, "the court should consider the Rule 12(b)(l) challenge first since if it must dismiss the complaint for lack of subject matter

jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." Charles A. Wright, et a]., *Federal* Practice and Procedure, Civil 2d. 3 1350 (1990) (citing *Bell* v. *Hood,* 327 U.S. 678 (1946)); *see also Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574,* 578 (1999) (noting that it is customary for courts to "first resolve doubts about its jurisdiction over the subject matter" before considering personal jurisdiction). A plaintiff bears the burden of proving that a federal court has subject matter jurisdiction over his claims. *Ashoff.* City *of Ukiah,* 130F.3d 409,410 (9th Cir. 1997).

The gravamen of Dubin's complaint is that the allegedly improper actions of those involved in his criminal prosecution, Rule 11 sanctions, and subsequent appeals constituted a fraud upon the court. The federal defendants argue that this court lacks subject matter jurisdiction over the portions of Dubin's complaint relating to his criminal convictions because a party may not bring an action for fraud upon the court to attack an earlier criminal conviction.[10] We

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[10] It is not entirely clear whether the federal defendants' argument is properly characterized as one for failure to state a claim, subject to dismissal under Rule 12(b)(6), or as one for lack of subject matter jurisdiction, subject to dismissal under Rule 12(b)(l). On the one hand, we could characterize the motion as one for failure to state a claim in that the federal defendants are arguing that Dubin failed to allege the facts necessary to state a claim of fraud upon the court. On the other hand, we could characterize the argument as one regarding lack of subject matter jurisdiction in that Dubin has failed to allege that there is such a thing as a federal cause of action for fraud upon the court in the context of criminal cases.

The major difference between the two motions is the type of information that a court may consider in assessing the motion. Whereas a court may not look to matters outside of the complaint in a 12(b)(6) motion, a court may, in some

agree.

Federal courts have inherent equitable power, via an action for fraud upon the court, to provide relief relating to a prior judgment where that judgment was secured by fraud perpetrated by officers of the court. Charles A. Wright, et al., Federal Practice *and* Procedure, Civil 2d. *5* 2870 (1 982). The action is designed to counter "wrong[s] against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." Hazel-Atlas Glass Co. *v.* Hartford-Empire *Co.*, 322 U.S. 238,246 (1 944). It is an extreme remedy and thus a court may only grant relief to prevent a "grave miscarriage of justice." *United* States *v. Beggerly,* 524 U.S. 38, 47 (1998).

In an independent action for fraud upon the court, it is the underlying action (where the fraud allegedly occurred) that provides the basis for federal jurisdiction over the matter. Thus, the fraud upon the court case may be heard by the same district court that heard the underlying suit. *Beggerly,* 524 U.S. at 46. The federal defendants argue, however, that the underlying suit which provides the basis

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cases, look beyond the complaint to determine whether subject matter jurisdiction exists. *See White v. Lee,* 227 F.3d *1214,* 1242 (9th Cir. 2000) (noting that a court may look beyond the complaint in assessing some 12(b)(l)motions); *Kingman Reef Atoll Inv., L.L.C. v. United States Dep't of the Interior*, 195 F. Supp.2d 1178, 1 182-83 (D. Haw. 2002) (same). However, the difference between the two types of motions is unimportant in this case because there is no need for us to look to facts outside of the complaint to determine whether Dubin may proceed. Whether we assess the federal defendants' motion as one falling under 12(b)(6) or as one falling under 12(b)(l), therefore, the analysis and ultimate conclusion remain the same: Dubin may not challenge his criminal convictions via an action for fraud upon the court.

for subject matter jurisdiction may not be a criminal case since fraud upon the court is civil in nature. Indeed, the law only recognizes fraud upon the court in the civil context. There is no federal statute that specifically authorizes a cause of action for fraud upon the court. The action is recognized as valid only in Federal Rule of Civil Procedure 60(b), which states that the federal rules do "not limit the power of a court to entertain an independent action to . . . set aside a judgment for fraud upon the court." The Federal Rules of Civil Procedure apply only to civil actions, so Rule 60(b) cannot authorize a cause of action for fraud upon the court to overturn a criminal conviction. *See* Fed. R. Civ. P. 1 (stating that "these rules govern the procedure . . . in all suits of a civil nature.") (emphasis added). There is no criminal analogy to Rule 60(b) which would authorize a fraud upon the court action in the criminal context.

Although the Ninth Circuit has not specifically ruled on the matter, every other circuit that has addressed the question has agreed with the federal defendants' position and has held that one may not bring an action for fraud upon the court to collaterally attack a criminal conviction. See *United States v. Gross*, 71 Fed. App. 270, No. 03-6335, 2003 WL 21 978748 (4th Cir. 2003); *United States v. Diaz*, 79 Fed-Appx. 151, No. 00-1 876,2003 WL 22434557 (6th Cir. 2003); *United States v. O'Keefe*, 1 69 F.3d 28 1 (5th Cir. 1999); United States v. Mosavi, 1 38 F.3d 1365 (11th Cir. 1998); *United States v. Ramsey*, 106 F.3d 404, No. 95-2854, 1997 WL 141 52 (7th Cir. 1997). Dubin has not cited to, nor can we find, a single case in which a court has allowed a plaintiff to bring an action for fraud upon the court to challenge a criminal conviction.[11] We therefore find that this court lacks

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[11] The federal defendants correctly assert that Dubin's claims would more properly be brought as an action for a writ of error *coram nobis* rather than as one for fraud upon the court. Although abolished in the civil context by

Federal Rule of Civil Procedure 60(b), the writ of error *coram nobis* is a valid means of collaterally attacking a criminal conviction where a person has already completed his sentence (and thus may not apply for a writ of habeas corpus). *Telink, Inc. v. United States*, 24 F.3d 42,46 (9th Cir. 1994) (citing *United States v. Morgan*, 346 U.S. 502,505 n.4 (1954)).

After hearing the federal defendants' position during oral argument, Dubin requested that we recharacterize his fraud upon the court claim as one for a writ of error *coram nobis*. Such a recharacterization is improper for several reasons. First, Dubin failed to request a writ of error *coram nobis* in his complaint. Second, "[such a motion is a step in the criminal case, and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil [proceeding." *Morgan*, 346 U.S. at 505 n.4. Thus, if Dubin had wished to request a writ of error *coram nobis*, he should have done so by filing a motion in his criminal case rather than by filing a new civil suit. Finally, we note that, even if we were to reach the merits of Dubin's claims with regard to his criminal convictions, we would decline to grant a writ of error *coram nobis*. The Ninth Circuit has set forth a four part test for assessing whether to grant *coram nobis* relief. Specifically, a petitioner must demonstrate that: 1) there is no "more usual" remedy available to him; 2) there are valid reasons for not attacking the conviction earlier; 3) the petitioner has suffered adverse consequences as a result of the conviction; and 4) the error is of the most fundamental nature. *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987). Here, Dubin fails on the second part of the test because he has not demonstrated any reason why he waited until 2003 to attack his criminal convictions, even though his complaint shows that he was aware of all of the alleged defects in his criminal trial and appeal by 1998 at the very latest. Dubin also fails the first part of the test because he has already taken advantage of the "more usual" remedy available to him -the appellate process. As outlined in the facts section of this

subject matter jurisdiction over Dubin's fraud upon the court claims insofar as they relate to his criminal convictions and dismiss his case with regard to the following defendants: the United States, the IRS,[12] Peyton, Peyton, Osborne,, Banfe, and Judge Real. The complaint is also dismissed for lack of subject matter jurisdiction with regard to Chief Judge Ezra insofar as it relates to Dubin's criminal convictions.

II. Personal Jurisdiction

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opinion, Dubin appealed his case twice to the Ninth Circuit and twice to the United States Supreme Court. In his complaint, he alleges that only one of those appeals was tainted by fraud upon the court and in no way questions the propriety of the other three appeals. See *United States ex rel. Bogis v. Tees*, 21 1 F.2d 69,72 (3d Cir. 1954) (declining to consider a petitioner's request for a writ of error *coram nobis* where the same arguments had already been considered and rejected on appeal). We therefore note that, even if we were to recharacterize Dubin's claim for relief as a petition for a writ of error *coram nobis,* we would still decline to grant the relief that he requests. We would add also that Dubin, for the reasons set forth above, would be equally unsuccessful even if he had timely filed his petition for writ of error *coram nobis* in his criminal proceeding.

[12] We note that the IRS would not be a proper party to the complaint even if we were to allow Dubin to go forward with his claims. The IRS has no capacity to sue or be sued. *See Blackmar v. Guerre,* 342 U.S. 5 12, 5 15 (1952) (noting that Congress must provide specific authorization for one of its agencies to be sued). Rather, the Commissioner of the IRS would be the proper party defendant. Nevertheless, had the Commissioner been named as a defendant, the complaint would have been dismissed on the same grounds as those for the dismissal of the above-named federal defendants.

Pursuant to Federal Rule of Civil Procedure 12(b)(2),a court may dismiss a case if the court lacks personal jurisdiction over any of the defendants. The plaintiff bears the burden of proving that personal jurisdiction exists as to each defendant. *Ballard v.* Savage, 65 F.3d 1495, 1498 (9th Cir. 1995). The plaintiff satisfies his burden "by alleging facts that, if true, would support an exercise of jurisdiction over the defendant." *Id.* We therefore assume for purposes of this motion that the facts that Dubin has alleged with respect to jurisdiction are true.

a. Service of Process on Peyton and Banfe

Although we have already dismissed Dubin's complaint for lack of subject matter jurisdiction with regard to Peyton and Banfe, their dismissal is also proper because Dubin failed to serve process upon them in a timely manner. Service of process is a jurisdictional issue. *Omni Capital Int'l, LTD. v. Rudolf Wolf & Co., 484 U.S. 97,* 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."). Without proper service, a court cannot consider the merits of a claim. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.,* 526 *U.S.* 344,344-45 (1 999) (calling service of process a "bedrock principle" and stating that "[in the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant.").

Federal Rule of Civil Procedure 4(m) requires a plaintiff to serve process upon a defendant within 120 days of filing a complaint. Failure to serve process as required by the rule subjects the complaint to dismissal without prejudice unless the plaintiff shows good cause for neglecting the 120 day deadline. Fed. R. Civ. P. 4(m). If a plaintiff demonstrates good cause, a court must extend the filing deadline by "an appropriate period." Id. The Ninth Circuit has noted that, in

drafting Rule 4(m)'s 120 day requirement and good cause exception, "Congress balanced the possible loss of a litigant's federal cause of action against the need to encourage diligent prosecution of lawsuits." *Townsel v. County of Contra Costa,* 820 F.2d 319, 321 (9th Cir. 1987).

Dubin filed his complaint on February 10, 2003. He did not serve Defendant Peyton until November 25, 2003. As of January 15, 2004, he had not served Defendant Banfe. Despite missing the 120 day deadline for both of these defendants, Dubin urges us not to dismiss his case with respect to Peyton or Banfe because he asserts that he had good cause for failing to serve them.

With respect to Peyton, Dubin alleges that he could not effect service of process because Peyton was out of the country from the commencement of Dubin's action until mid-summer of 2003. In July of 2003, Peyton took office as the Director of the Department of Public Safety for the State of Hawaii in Honolulu. Dubin admits that he was aware of Peyton's return to Honolulu but argues that Peyton continued to evade service after his return. Dubin has provided the affidavit of his process server, Anthony Shannon, in which Shannon states that, starting in July 2003, he called Peyton's office "four or five times to get an appointment to serve him and [that he] never received a call back." (Decl. of Anthony Shannon 7 5.)

Dubin states that he had "good cause" within the meaning of Fed. R. Civ. P. 4(m) for failing to serve Peyton because Peyton evaded service by not returning his process server's phone calls. It is true that a defendant's evasion of service constitutes "good cause" for failure to meet the 120 day deadline. *Fimbres v. United States*, 833 F.2d 138, 139 (9th Cir. 1987) (citations omitted). Mistakes of counsel, a desire to amend a complaint before service, or ignorance of the rules, on the other hand, do not constitute "good cause" for purposes of Rule 4(m). Id.; see *also Wei v. Hawaii*, 763

F.2d 370 (9th Cir. 1985).

We find that Dubin's asserted rationale for his failure to serve Peyton within the 120 day time period does not constitute "good cause" warranting an extension of the service of process deadline. Federal Rule of Civil Procedure 4(f) details how to effect service upon individuals in a foreign country. While Peyton was abroad, Dubin could have utilized one of the means listed in the rule to serve Peyton. In his pleadings, however, Dubin does not allege that he attempted service upon Peyton at all during his time abroad.

Likewise, Rule 4(e) provides the proper method for effecting service of process upon defendants sued in their individual capacities. One of the methods of serving a summons and complaint set forth in Rule 4(e) is personal service of process. Pursuant to this rule, Dubin's process server asserts that he repeatedly tried to serve Peyton personally. Personal service is not, however, the only means of effecting service upon persons sued in their individual capacities. Dubin's process server also could have "deliver[ed] a copy of the summons and the complaint. . . to an agent authorized by appointment or by law to receive service of process." Fed. R. Civ. P. 4(e). Dubin does not allege that he or his process server attempted service upon Peyton's authorized agent. Rule 4(e) also provides that the process server could have delivered the summons and complaint to Peyton's "dwelling house or usual place of abode." Again, Dubin does not allege that he made any attempt to do so. In light of these omissions, we cannot conclude that Peyton evaded service. Simply failing to return a process server's phone calls does not amount to the kind of purposeful evasion of service that would trigger the good cause exception to the 120 day deadline in the rule. For these additional reasons, Dubin's complaint is dismissed with regard to Defendant Peyton.

Dubin's only asserted rationale for failing to serve

Banfe is that he has been unable to find him. He makes no allegations that Banfe has evaded service, nor does he set forth what efforts he has made to find Banfe. Again, Dubin's allegations do not constitute good cause for extending the service of process period and the complaint is therefore also dismissed with regard to Banfe for failure to serve process in a timely manner.[13]

b. Judicial Immunity

Once again, although we have previously set forth the grounds for dismissal of Dubin's Complaint for lack of subject matter jurisdiction with regard to Judge Real and (in part) Chief Judge Ezra, we note that Dubin's claims also should be dismissed with respect to both because, as judges, they are absolutely immune from suit for monetary damages.[14] Absolute immunity entails not only the right to

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[13] In addition to the reasons listed above (that this court lacks subject matter jurisdiction over Dubin's fraud upon the court claim with regard to his criminal convictions and that this court does not have personal jurisdiction over Banfe), there is still another reason why Banfe should be dismissed from this suit. Although Dubin attempted to sue Banfe "individually," Dubin's complaint alleges that Banfe engaged in wrongdoing in his capacity as an IRS agent. Where an IRS agent is sued in his professional capacity, the United States is the proper party to the suit rather than the IRS agent himself. *Gilbert* v. *DaGrossa*, 756 F.2d 1455 (9th Cir. 1985) ("[A] suit against IRS employees in their official capacity is essentially a suit against the United States."). Banfe is therefore not a proper party and should also be dismissed from Dubin's suit because Dubin does not allege that Banfe engaged in any wrongdoing unrelated to his duties as an IRS agent.

[14] Dubin attempts to circumvent the rule of absolute judicial immunity by requesting that the court impose "sanctions" upon the judges rather than damages. This

be free from the consequences of litigation, but also from the burden of defending oneself. 46 Am.Jur.2d Judges §68 (2003). In other words, immunity is a jurisdictional issue to be decided before addressing the merits of an action. *Imbler v. Pachtman*, 424 U.S. 409,418 n.3 (1976) ("An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity."). Whenever

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specious argument fails for several reasons. First, it is clear that Dubin has simply labeled his damages claim for relief as one for sanctions to avoid the rule of absolute immunity. If we were to allow Dubin to proceed with his claims against the judges, any person attempting to subvert the absolute judicial immunity rule could simply label his claim as one for sanctions rather than for damages. As a matter of policy, this would completely swallow the absolute judicial immunity rule. Second, Dubin has not cited to any statute, rule, or case that allows one district court judge to sanction another district court judge's conduct where that conduct relates to the judge's judicial functions. In fact, the legal authority suggests otherwise. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, the Supreme Court listed the types of relief that a court may grant to remedy fraud upon the court, including ordering a new trial, changing the terms of a judgment, or requiring that the beneficiaries of the fraud return any benefit received from the earlier judgment. 322 U.S. 238, 244 (1994). Although the list was not exhaustive, all the remedies enumerated by the Court were aimed at making the victim of the fraud whole rather than at punishing the perpetrators. A sanction does not fit with the other remedies listed in the *Hazel-Atlas Glass* opinion because it is inherently punitive rather than remedial. Third, allowing Dubin to bring an action for sanctions against the judges would completely subvert the policy rationale behind cloaking judges with absolute immunity -- that of ensuring that judges are able to perform their jobs free from the constant threat of litigation.

feasible, the issue of immunity should be decided before reaching the question of whether a claim for relief has been stated.[15]

Judges are absolutely immune from suit for monetary damages, with two special exceptions.[16] First, a judge may be subject to liability where his actions are taken in the "clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S. 349,357 (1978) (quoting *Bradley v. Fisher*, 13 Wall. 335, 351 (1872)). Second, a judge may be held liable for "non-judicial acts." *Id.* at 360. In assessing whether an exception to the judicial immunity rule applies, a court should only consider whether the judge's "ultimate act" fits either of these two exceptions and should disregard any of the actions or motives that underlie the judge's ultimate act. *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986). For

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[15] However, we have already discussed the invalidity of some of Dubin's claims against individuals who may be entitled to immunity earlier in this opinion since these broader issues also affected other defendants who have not claimed that they are entitled to immunity.

[16] Although judges and prosecutors are immune insofar as Dubin has requested money damages from them, they are not automatically immune from suit for fraud upon the court claims that request equitable relief. Dubin has not requested any equitable relief that the judges or prosecutors themselves would be able to provide, so, even if there is no specific grant of immunity with respect to Dubin's equitable claims, the judges and prosecutors still are not proper parties to the suit. See *Sampson v. Marovitz*, No. 88-C-5697, 1988 WL 121588, *2 (N.D. 111. Nov. 8, 1988) (finding that there was no need to include a judge or his law clerks as defendants in a fraud upon the court action where no equitable relief was requested directly from the judge or law clerks themselves).

example, a judge will not be personally liable for his actions even if it is found that he conspired with a "prosecutor to predetermine the outcome of a judicial proceeding," as long as he has jurisdiction over the ultimate act of determining the outcome of a case. *Id.*

Dubin fails to specify which of the "ultimate" judicial acts that he complains of constitute the basis for his fraud upon the court action. He also makes no arguments regarding which, if any, of those acts fit either of the exceptions to the rule of absolute judicial immunity. From what we can gather by reading his complaint, however, his core allegations against Chief Judge Ezra and Judge Real are that: 1) Judge Real participated in an *ex parte* communication with Peyton and Banfe in which Peyton and Banfe reported that Dubin was faking illness so that he would not have to appear for his criminal trial; 2) Judge Real entered false findings of fact at Dubin's criminal trial, stating that Dubin had his files at trial when in fact Dubin did not have his files; 3) Judge Ezra purposely "steered" Dubin's criminal case to Judge Real knowing that Judge Real had a "reputation for volatility, dislike of attorneys, and [often imposed] maximum, harsh failure-to-file sentences" (Compl. ¶ 21); 4) Judge Ezra "poor-mouthed" Dubin to Ninth Circuit Judge Poole while Dubin's criminal appeal was pending; 5) Chief Judge Ezra should have disqualified himself from participation in the Rule 11 proceedings against Dubin; 6) Chief Judge Ezra asserted improper influence over the magistrate judge who assessed the amount of Rule 11 sanctions imposed against Dubin; and 7) Chief Judge Ezra considered improper factors in deciding to sanction Dubin.

Considering each of these allegations in turn, we find that none of these alleged acts fits either the non-judicial act or absence of jurisdiction exception to the general rule of absolute judicial immunity. First, Dubin's allegations fail with regard to the alleged *ex parte* communication between Peyton, Banfe, and Judge Real. A communication between a

judge and a lawyer regarding a pending case (the "ultimate act" alleged by Dubin) is a judicial action, regardless of whether or not it was done in open court or *ex parte*. See *Mullis v. United States Bankr. Court* for the Dist. of Nevada, 828 F.2d 1385. 1388 (9lh Cir. 1987) (noting that an *ex parte* communication between a judge and a bankruptcy trustee is a judicial act); *see* also Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978) (noting that "[courts and judges often act *ex parte*" and that doing so does not destroy judicial immunity). Furthermore, Judge Real had jurisdiction as the presiding judge in Dubin's criminal trial to inquire into Dubin's physical capacity to attend trial. The *ex parte* communication therefore does not meet either exception to the rule of absolute judicial immunity.

The same is true regarding Dubin's allegation that Judge Real entered false findings of fact at the close of Dubin's criminal trial. The "ultimate act" complained of is that Judge Real entered false findings of fact. Entering findings of fact in a criminal case is a "judicial act" and, again, as the presiding judge over Dubin's criminal trial. Judge Real had jurisdiction to enter findings of fact in the case. Judicial immunity thus cloaks Judge Real from liability for his actions relating to Dubin's criminal proceedings.

Likewise, Judge Ezra cannot be held liable with regard to Dubin's allegation that Judge Ezra "steered" Dubin's criminal case to Judge Real. The chief judge of a district court has statutory authority to assign cases to visiting judges. 28 U.S.C. 5 137 (providing that the "chief judge of the district court shall .. . assign the cases so far as such rules and orders do not otherwise provide."). Pursuant to this authority, then Chief District Court Judge Alan C. Kay assigned a calendar of cases to visiting Judge Real in May of 1994, including Dubin's criminal case. Therefore, it was not (as Dubin claims) Judge Ezra who reassigned Dubin's criminal case to Judge Real. Nor would Judge Ezra, had he been chief judge at the time, been liable for making

the assignment because as chief judge he would have been authorized by statute to refer the case to Judge Real, and would have enjoyed absolute immunity from suit for doing so. Since motive has no bearing on the issue of judicial immunity, it is also irrelevant for purposes of the immunity analysis that Judge Ezra allegedly influenced Chief Judge Kay's decision.

Next, Dubin alleges that Judge Ezra and Ninth Circuit Judge Poole engaged in a conversation about Dubin while Dubin's criminal appeal was pending. The "ultimate act" of which Dubin complains in this allegation is not the conversation itself but that Judge Poole improperly considered the conversation when assessing the merits of Dubin's claim. As noted above, improper motive is not sufficient to lift the bar of judicial immunity where a judge acts within his jurisdiction. Here, Judge Poole was well within his jurisdiction in deciding the merits of Dubin's appeal, and doing so constituted a judicial act, so he is protected by absolute immunity.

Chief Judge Ezra is also immune from liability for the actions that he took in relation to the Rule 11 proceedings. With regard to Dubin's allegation that Chief Judge Ezra should have recused himself, we observe that the decision to recuse oneself is inherently a judicial act, and a judge presiding over a case has jurisdiction to make such a decision.[17] Chief Judge Ezra is also immune with respect to

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[17] Chief Judge Ezra was not the judge who denied Dubin's disqualification motion. To avoid the appearance of impropriety, Chief Judge Ezra exercised considerable caution. Rather than directly assigning the motion to recuse to another judge, he chose another judge who would then, in turn, assign the motion to a third judge. It was this third judge who finally decided that Chief Judge Ezra did not need to recuse himself from consideration of the Rule 11 issue. Given these precautions, it is clear that Chief Judge Ezra

Dubin's allegation that he asserted improper influence over the magistrate judge who, acting as a special master, assessed the amount of Dubin's Rule 11 sanctions. Chief Judge Ezra was not required to assign the case to a magistrate judge to assess the amount of sanctions; he could have made that determination himself. See Fed. R. Civ. P. 11 (c) (authorizing judges to impose sanctions upon attorneys who file non-meritorious complaints). In fact, he eventually independently reviewed and rejected the magistrate judge's first recommendation regarding the amount of sanctions.

For the same reasons, Chief Judge Ezra cannot be held individually liable for considering allegedly improper factors in deciding whether to impose Rule 11 sanctions. As already discussed, the imposition of monetary sanctions is a judicial act, performed with the jurisdiction provided by Rule 11 itself. Thus, Chief Judge Ezra is immune from suit for damages relating to his decision in the Rule 11 case.[18]

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acted with complete propriety in deciding not to recuse himself.

[18] Dubin attempts to argue that the rule of judicial immunity is inapplicable in this case because judges may be held criminally responsible for their conduct. This assertion is contrary to established Supreme Court precedent. In *Imbler v. Pachtman,* the Court stated that it "has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242." 424 U.S. 409, 429 (1976). In light of the Supreme Court's statement in *Imbler*, Dubin's argument that criminal liability should automatically create a civil cause of action against a judge is entirely without merit.

c. Prosecutorial Immunity

Dismissal of Dubin's complaint is also warranted with regard to United States Attorneys Peyton and Osborne on the ground of prosecutorial immunity. Once again, Dubin's complaint is not entirely clear regarding which of the prosecutors' actions constituted fraud upon the court. Dubin's central allegation appears to be that Assistant United States Attorneys Peyton and Osborne should be held personally liable for falsely reporting, in an *ex parte* communication to Judge Real, that Dubin was faking his illness.

Prosecutors are entitled to either qualified or absolute immunity from civil suit for their official duties, depending on the type of conduct at issue.[19] A prosecutor is entitled to absolute immunity where he "engages in activities 'intimately associated with the judicial phase of the criminal process.'" *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 460 (1976)). On the other hand, a prosecutor is only entitled to

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[19] Most of the prosecutorial immunity cases discussed in this opinion involve the question of whether a prosecutor is immune from suit under 42 U.S.C. $ 1983 and do not directly address immunity in the context of an action for fraud upon the court. The cases all rely on the common law, however, in deciding whether to extend immunity in the § 1983 context, *Imbler* v. *Pachtrman.* 424 U.S. 409, 417-1 8 (1976) (holding that government officials are absolutely immune in 3 1983 actions only where the common law has traditionally extended such immunity). Because the common law is relevant to the issue of whether a prosecutor is immune from suit in a fraud upon the court action, and because the § 1983 cases themselves rely on the common law, the § 1983 cases are informative on the issue of whether Peyton and Osborne are immune in the present action.

qualified immunity for investigatory or administrative functions, or for those duties which are normally conducted by a police officer. *Id.* The presumption is that qualified immunity applies to most prosecutorial actions. Thus, a prosecutor seeking absolute immunity bears the burden of showing that absolute immunity is justified for the task at issue. *Burns v. Reed,* 500 U.S.478, 486-87 (1991).

Dubin argues that Peyton and Osborne are entitled to only qualified immunity because the act of calling the hospital to find out about Dubin's condition was investigative and not "intimately associated with the judicial phase of the criminal process." *Broam,* 320 F.3d at 1028. It is not the act of calling the hospital, however, of which Dubin ultimately complains. Rather, Dubin seeks relief because of the manner in which the information received from the hospital was communicated to the court. An *exp arte* communication with a judge, whether improper or not, is an act that is associated with the judicial phase of the proceedings. Like a proceeding in open court, it is a communication between a judge and a prosecutor about a case. Thus, just as a prosecutor is immune for asserting something false or otherwise improper in open court, Osborne and Peyton are absolutely immune from civil liability in relation to their statements made over the telephone to Judge Real. For this reason, the complaint is also dismissed with regard to Peyton and Osborne.

d. Immunity of Defendant John Candon

In 1997, John Candon was appointed as the trustee for the bankruptcy estate of Dubin's former client, Allan Kunimoto. In 1999, Kunimoto, represented by Dubin, named Candon as a defendant in the federal court action which gave rise to the Rule 11 sanctions against Dubin. As part of the Rule 11 sanctions, Candon was awarded attorney's fees to cover his legal expenses in defending against the Kunimoto litigation. Although Dubin does not allege that Candon engaged in any wrongdoing, he has named Candon as a

defendant in this action because he seeks the return of the legal fees that were awarded to Candon.

It is a well-settled principle that courts have no jurisdiction to entertain an action against a bankruptcy trustee, sued in his capacity as trustee, without the permission of the appointing bankruptcy court.[20] *In re Castillo*, 297 F.3d 940, 945 (9th Cir. 2002) ("The requirement of obtaining leave from the appointing court to sue a trustee is long-standing.") (citing *Barton v. Barbour*, 104 U.S. 126, 129 (1 88 1)). Dubin does not assert that he has obtained permission of the bankruptcy court that appointed Candon to sue him. This court therefore has no jurisdiction over Candon in his role as trustee and we must dismiss Dubin's complaint with regard to him.[21]

IV. Action Against the Judicial Council of the Ninth Circuit

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[20] Dubin should be well aware of this rule because it was one of the reasons cited by Chief Judge Ezra in deciding to award Rule 11 sanctions in the earlier Kunimoto action. See Order Granting Defendants' Motion for Sanctions, Nos. 98-00453 & 98-00475, at 4-5 (D. Haw. Dec. 7, 1998) (noting that "[p]laintiffs failed to request permission from the bankruptcy court in order to sue the Trustee.").

[21] Dubin attempts to circumvent this rule by suing Candon "individually." However, Candon is unquestionably being sued in connection with his role as bankruptcy trustee for Kunimoto because it was in that capacity that he originally became involved with the Kunimoto litigation, and eventually received attorney's fees stemming from the Rule 11 sanctions. The mere labeling of Candon as an "individual" defendant does not change the fact that he was sued as a bankruptcy trustee, and thus does not obviate the requirement that Dubin seek permission to sue Candon.

Dubin requests that this court issue a mandatory injunction against the Judicial Council of the Ninth Circuit, "ordering it to fulfill its mandated responsibilities under the Judicial Council's Reform and Judicial Conduct and Disability Act and the Good Behavior Clause of Article 111, Section 1 of the United States Constitution." (Compl. ¶ 185.) Specifically, Dubin asks that this court order the Judicial Council to investigate his allegations of wrongdoing against Judge Real and Chief Judge Ezra.

Although a court has wide latitude to fashion remedies for fraud upon the court, Hazel-Atlas Glass *Co. v. Hartford-Empire Co.,* 322 U.S. 238,244 (1944) ,that latitude must be considered in light of the fact that United States District Courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As an obvious principle of law, a district court may not order a court of appellate jurisdiction to take any action. *Mullis v. United States Bunkr. Court for the District of Nevada,* 828 F.2d 1385, 1393 n.19 (9th Cir. 1987) ("Needless to say, a district court has no such authority to 'review' any ruling of a court of appeals"); *Panko v. Rodack*, 606 F.2d 168, 171 n.6 (7th Cir. 1979) (noting that a district court does not have jurisdiction to entertain a mandamus action against clerks of the United States Supreme Court). The same reasoning applies to the supervisory actions of a circuit judicial council. Accordingly, this court has no authority to order the Judicial Council of the Ninth Circuit to take any action. Dubin's complaint is therefore dismissed with regard to the Judicial Council.

V. Motion to Dismiss for Failure to State a Claim

Once we have dismissed the bulk of Dubin's complaint for lack of subject matter jurisdiction, for failure to serve process, and for lack of personal jurisdiction, the only defendant left standing is the Bank of Hawaii ("BOH). We thus consider the BOH's motion to dismiss for failure to

state a claim under Federal Rule of Civil Procedure 12(b)(6).

In considering a motion to dismiss, we must accept all well-pled allegations in the complaint as true and draw all reasonable inferences in the plaintiffs favor. *Heto v. Glock, Inc.*. 349 F.3d 1191, 1195 n.3 (9th Cir. 2003). Therefore, a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102,2 L.Ed.2d 80 (1957). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) (citing *Robertson* v. *Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984)).

Defendant BOH argues that Dubin's complaint must be dismissed on the grounds of *res judicata*. Res judicata bars a litigant from bringing any claim that was raised or could have been raised in a previous action. *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1 189, 1192 (9th Cir. 1997). A suit is barred by *res judicata* where the previous action involved: 1) the same claim as the current action; 2) a final judgment on the merits; and 3) identical parties or parties in privity. *Sidhu v. Fletco Co., Inc.*, 279 F.3d 896, 900 (9th Cir. 2002). Here, the parties agree that the Rule 11 case involved a final judgment on the merits as well as identical parties. The only question presented by the motion to dismiss is whether Dubin has raised, or could have raised, the same claims as those presented in his fraud upon the court action in the earlier Rule 11 proceedings.

Dubin asserts that, although he brought up many of the issues detailed in the present complaint in the earlier litigation, his fraud upon the court allegations are "considerably different" than anything raised before because, "part of this case does not ripen until Judge Ezra's wrongful involvement in Plaintiffs criminal conviction is proven,

whereupon that would trigger issues that were not before the Court of Appeals and which would obviously reopen the sanctions issues for reconsideration." (Plaintiff's Memorandum in Opposition to BOH's and Candon's Joint Motions to Dismiss at 3.) In essence, Dubin argues that *res judicata* should not bar his claims because it was not until he knew of the grand conspiracy allegedly perpetrated by Chief Judge Ezra during Dubin's criminal case *and* the Rule 11 case that Dubin was able to bring the present action. Yet Dubin has been complaining of this grand conspiracy for quite some time, and did so before various courts involved in the Rule 11 case.

For example, in Dubin's motion for reconsideration of the Rule 11 sanctions, filed with the United States District Court for the District of Hawaii on December 21, 1998, Dubin outlined every single allegation against Chief Judge Ezra that he now raises in the present complaint. Judge Pence (against whom, incidentally, Dubin makes no claims of bias, prejudice, or control) denied Dubin's motion on the ground that he was unable to present any factual support for his allegations. Denial of Motion for Reconsideration of Motion for Disqualification, at 2 (D. Haw. Jan. 20, 1999). In his opinion, Judge Pence specifically considered Dubin's claims of "'Judge Ezra's alleged interference with [Dubin's] misdemeanor appeal' . . . as well as 'Judge Ezra's alleged participation in the nonrandom assignment of a visiting judge to Dubin's misdemeanor trial." *Id.* (emphasis in original). The declarations made by Dubin in his 1998 motion demonstrate that he was well aware of the conspiracy allegedly perpetrated by Chief Judge Ezra and that he raised his claims of conspiracy in the district court when requesting disqualification of Chief Judge Ezra. Judge Pence's decision makes it clear that Dubin's claims were considered and denied at that time because the court found them to be lacking in factual basis. Dubin is therefore barred by *res judicata* from once again raising the identical issues in an

action for fraud upon the court.[22]

VI. Sanctions

Dubin cannot continue in his dogged attempt to relitigate claims which have already been fully and finally adjudicated in the federal courts as having no legal merit, without appropriate legal consequences flowing from such actions. Although we are fully prepared to define those consequences, defendants have specifically requested that Dubin not be sanctioned. During oral argument, each of the defendant's attorneys stated that they considered responding to Dubin's complaint with a request for Rule 11 sanctions but that, after much deliberation, they decided not to request sanctions. Their concern was that, based on Dubin's past behavior, any award of sanctions in the present case would lead to several more years of litigation, including new motions for reconsideration, motions to disqualify, appeals, motions for rehearing and rehearing *en banc* of appeals, applications for writs of certiorari to the United States Supreme Court, applications for writs of mandamus, and possibly another action for fraud upon the court. In the end, the defendants were more concerned about obtaining some semblance of finality and not further exacerbating the cost of defending Dubin's aggressive and indiscriminate litigiousness than about punishing Dubin for bringing them into court with yet another non-meritorious complaint.

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[22] The only novel argument made in Dubin's complaint is his allegation that the Rule 11 sanctions conflicted with the District of Hawaii's Local Rules. (Compl. ¶ 183(b)). He does not specify to which rule he is referring or explain how that rule was violated. The BOH believes that he is referring to Local Rule 54.3 and points out that it was enacted in December 2002, well after the sanctions were levied against Dubin.

In light of Dubin's past court behavior, the defendants' concerns about the down side in requesting sanctions are well-founded. Because defendants already have been unfairly burdened by this frivolous litigation, we will respect their wishes and not assess additional monetary sanctions, although it would be otherwise entirely appropriate to do so. We do, however, reprimand Dubin for his continued abuse of the court system by re-litigating, without legal authority, matters that have already been decided with finality. Accordingly, we are instructing the clerk of this court to forward this opinion to Hawaii's Office of Disciplinary Counsel (ODC) for review and for any further action it deems appropriate.

V. Conclusion

For the forgoing reasons, Dubin's complaint is dismissed with prejudice in its entirety. It is so ordered.

DATED: January 28, 2004.

/s/ Marvin E. Aspen

MARVIN E. ASPEN
United States District Court Judge

[A SEPARATE "JUDGMENT IN A CIVIL CASE" WAS THEREAFTER ENTERED BY THE CLERK OF THE COURT ON JANUARY 29, 2004]

4. Unpublished Memorandum, Filed June 29, 2006, In The United States Court Of Appeals For The Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GAR VICTOR DUBIN	)	NO. 04-15418
	)	
Plaintiff-Appellant,	)	MEMORANDUM*
	)	
vs.	)	
	)	
MANUEL L. REAL, ET AL.,	)	
	)	
Defendants-Appellees.	)	
	)	

Appeal from the United States District Court
for the District of Hawaii
Marvin E. Aspen, District Judge, Presiding

Submitted June 16, 2006**

Honolulu, Hawaii

Before: B. FLETCHER, PREGERSON, and HALL, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Plaintiff-Appellant Gary Victor Dubin appeals the district court's dismissal of his action for "fraud upon the court" under Rule 60(b) of the Federal Rules of Civil Procedure. Dubin seeks to restore his name and recover money in connection with two matters that he has litigated in the District of Hawaii and this court over the last twelve years.[23] We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we affirm the district court. The facts are known to the parties and we do not recite them here.

Several of Dubin's claims for fraud upon the court arise out of his 1994 criminal convictions for willful failure to file income tax returns.[24] The district court dismissed all claims relating to the criminal conviction for lack of subject matter jurisdiction. We review a dismissal for lack of subject matter jurisdiction de novo. *See Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109, 1111 n.2 (9th Cir. 2004)

The Federal Rules of Civil Procedure, by their own terms, apply only to *civil* actions. *See* Fed. R. Civ. P. 1 (stating that "these rules govern the procedure . . . in all suits of a civil nature"). Every circuit that has addressed the question has agreed that a defendant may not bring an action for fraud upon the court to collaterally attack a criminal

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[23] *See Kunimoto v. Fidell*, 2004 WL 1109485 (9th Cir. 2004); *Kunimoto v. Fidell*, 2001 WL 1480656 (9th Cir. 2001); *United States v. Dubin*, 1998 WL 4734 (9th Cir. 1998); *United States v. Dubin*, 1995 WL 764141 (9th Cir. 1995).

[24] These claims involve the following defendants: District Judges Manuel Real and David Alan Ezra, Assistant U.S. Attorneys Leslie Osborne and John Peyton, the United States, the Internal Revenue Service ("IRS"), and IRS. Investigator Charles Banfe. Judge Ezra is also involved as a defendant regarding the civil Rule 11 sanctions matter discussed below.

conviction. *See United States v. 0 'Keefe*, 169 F.3d 28 1,285 (5th Cir. 1999) (noting that Supreme Court precedent "certainly does not require or contemplate that Rule 60(b)(6) [for fraud upon the court] . . . be applied in criminal cases"); *United States v. Mosavi*, 138 F.3d 1365, 1366 (11th Cir. 1998) ("We hold that the defendant cannot challenge the criminal forfeiture orders at issue under the Federal Rules of Civil Procedure. . . . Rule 60(b) simply does not provide for relief from judgment in a criminal case . . . ."); *see* also *United States v. Diaz*, 2003 WL 22434557 (6th Cir.2003) (same); *United States v. Gross*, 2003 WL 21978748 (4th Cir. 2003) (same); *United States v. Ramsey*, 106 F.3d 404, 1997 WL 141 52 (7th Cir. 1997) (same). We agree with our sister circuits that an action under Rule 60(b) of the Federal Rules of *Civil* Procedure cannot be used to collaterally attack a *criminal* conviction. We hold that the dismissal of the complaint as to these defendants was proper. [25]

Dubin also asserts a claim for fraud upon the court based on the Rule 11 sanction that Judge Ezra imposed in a civil bankruptcy matter. *See Kunimoto v. Fidell*, 2001 WL 1480656 (9th Cir. 2001). He names Judge Ezra, bankruptcy trustee John Candon, and the Bank of Hawaii as defendants. This claim fails as to Judge Ezra based on judicial immunity and as to the other defendants based on Dubin's failure to

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[25] We further note that: (1) defendants Peyton and Banfe may not have been timely served with process under Rule 4(m) of the Federal Rules of Civil Procedure; (2) defendants Peyton and Osborne may be protected by prosecutorial immunity; (3) Judges Real and Ezra are likely entitled to absolute judicial immunity. We state no opinion as to those defenses. We instead affirm based on subject matter jurisdiction because it is customary for a court to "first resolve doubts about its jurisdiction over the subject matter" before considering other jurisdictional defenses or defenses on the merits. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999).

state a claim upon which relief can be granted.

A judge is immune from civil actions for damages and claims for "declaratory, injunctive and other equitable relief." *Mullis v. U.S. Bankr. Court*, 828 F.2d 1385, 1394 (9th Cir. 1987). A judge may be liable: (1) where his actions were taken in clear absence of all jurisdiction, or (2) when he commits a "nonjudicial act." *See Stump v. Sparkman*, 435 U.S. 349, 357, 360 (1978). Neither of those exceptions existed here. Judge Ezra's ultimate act - the imposition of Rule 11 sanctions - was unquestionably a judicial act, and it was made in accordance with appropriate jurisdiction. The dismissal of claims against Judge Ezra based on judicial immunity was proper.

Finally, the claims against bankruptcy trustee John Candon and the Bank of Hawaii must be dismissed for failure to state a claim. Dubin maintains that Candon and the Bank were only included in this action as "nominal defendants" to facilitate recovery of the Rule 11 sanctions. Dubin's complaint does not ascribe any wrongdoing to either Candon or the Bank, nor does it allege that they played any part in the alleged fraud upon the court. Accordingly, we conclude that it was proper for the district court to dismiss the action as to Candon and the Bank of Hawaii for failure to state a claim.[26]

Dubin's impassioned plea in this case does not fall on deaf ears. The district court below noted that the IRS completed a six-year audit of Dubin's finances in 2002, and the IRS concluded that Dubin had no taxable income for all

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[26] We observe that the claims against both Candon and the Bank might have also been barred by *res judicata*. The claim against John Candon might also have been dismissed under the *Barton* doctrine. *See Barton v. Barbour*, 104 U.S. 126, 129 (1881). We decline to pass on the merits of these defenses, however, because Dubin failed to state a claim as to these defendants.

three years for which he was convicted of failing to file tax returns.[27] Dubin served nearly twenty months in prison for his failure to file. Those allegations notwithstanding, Dubin simply cannot collaterally attack his criminal conviction through this civil action for fraud upon the court. For the foregoing reasons, the district court is **AFFIRMED**.

5. Unpublished Order, Filed September 11, 2006, In The United States Court Of Appeals For The Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GAR VICTOR DUBIN	NO. 04-15418
Plaintiff-Appellant,	ORDER[*]
vs.	
MANUEL L. REAL, ET AL.,	
Defendants-Appellees.	

Before: B. FLETCHER, PREGERSON, and HALL, Circuit Judges.

[* The panel mistakenly labeled its denial of reconsideration as an "Order" when it should have been entitled an unpublished "Memorandum."]

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[27] We note, as the district court did, that we must accept as true Dubin's factual allegations for purposes of the motions to dismiss. See Zimmerman *v. Or. Dept. of Justice*, 170 F.3d 1169, 1171 (9th Cir. 1999).

Judge Pregerson has voted to deny the petition for rehearing en banc, and Judges B. Fletcher and Hall so recommend. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Accordingly, the petition for rehearing is **DENIED**.

6. Rule 28(j) Letter Submitted To The Court Of Appeals, Dated June 5, 2006, Attn: Cathy A. Catterson, From Petitioner Gary Victor Dubin

Court of Appeals - Ninth Circuit
Attn: Cathy A. Catterson, Clerk
95 Seventh Street
San Francisco, CA 94103-1526

Re: Dubin v. Real, Case No. 04-15418
Calendared for Honolulu, Hawaii, June 16, 2006

Dear Ms. Catterson:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and Circuit Court Rule 28-6, I am writing, with respect to the central remedial issue on appeal, to bring to the attention of the Panel presiding over the above-entitled appeal, through your office as required, the following supplemental decisional citation: In re Dubin, IRS District Appeals Office (Seattle, April 13, 2006), a true and correct copy of which is attached for the convenience of the Panel and the parties.

Briefly, the relevance of this citation is that I was convicted of three federal failure-to-file misdemeanors, bench-tried by the Honorable Manuel L. Real visiting in Honolulu, sentenced consecutively to 30 months of imprisonment, and fined $125,000.00 as supposedly the Government's net "tax loss," plus charged $6,685.71 in prosecution costs, for allegedly not reporting $518,744.58 in net taxable income in 1986, 1987, and 1988, and I served 19½ months in three Mainland federal

prisons.

Released from incarceration, and continuing to profess my innocence, I requested and received a full-blown independent audit from a skeptical IRS District Examinations Office in Seattle, which took nearly six years to complete, as most of my possessions had been stolen during my incarceration while taken away from my affairs, and which, despite the loss of my tax records, nevertheless fully exonerated me, concluding that rather than having any taxable income whatsoever during any of the three years in question, I actually had a combined *negative* $337,258.00 taxable income (loss), whereupon I received a near six-figure refund due to loss carrybacks to prior years, and no IRS civil failure-to-file tax penalties were imposed for any of those three years for which I was incongruously criminally prosecuted, convicted, fined, and incarcerated.

With documented proof, additionally, that my convictions were the result of blatant prosecutorial and judicial misconduct, I filed a civil complaint for fraud on the Court, seeking, *inter alia*, to set aside my criminal convictions and for a return of my much-needed $125,000.00, with interest, that I was wrongfully required to pay as a result of erroneous IRS trial testimony, and for an award of sanctions, fully cognizant of the fact that mine was and is a case of first impression in that regard, challenging sacrosanct, judicially self-created, immunity doctrines trumpeting *Rex non potest peccare*.

At the hearing below, which resulted in the swift dismissal of my Complaint without being allowed any discovery, for supposedly a lack of subject matter jurisdiction, official immunity, and *res judicata*, the presiding visiting District Judge obliquely suggested, alternatively, that I might instead seek "executive relief as far as your conviction is concerned" -- which I then did (Record, Transcript of Proceedings for December 11, 2003, page 62, lines 18-19).

The ultimate, recent outcome of that subsequent formal written plea to the IRS District Appeals Office in Seattle, seeking reimbursement in the form of a requested tax

credit against income tax liabilities for subsequent years, for the $125,000.00 "tax loss" fine I wrongfully was required to pay, is set forth in its recent decision attached, denying that the IRS has "jurisdiction" to be able to return my money since "the penalty went to the court and not to IRS," despite otherwise exonerating me of any such "tax loss," and that that would "have to be done by the court, presumably through an appeal. You will have to contact the court system and pursue adjustment, refund or relief there."

My present Panel, therefore, which I am now advised ideally includes fortuitously in its majority two Circuit Court Judges who have already previously sat on other panels affirming my convictions, will have to decide whether in the Ninth Circuit every wrong can eventually have a remedy, or whether it is simply against judicial policy to admit mistakes, even if somehow understandable at the time, once again without even the courtesy of an oral argument, leaving me confined -- this time riding an unconscionable jurisdictional merry-go-round no matter the proven merits of my case.

Very truly yours,

Gary Victor Dubin

GVD/o /enclosure (plus four copies)
Gary Victor Dubin
copy w/encl. to all counsel of record

[The letter enclosed from the IRS Seattle District Appeals Office is set forth on the following page, informing Petitioner that a credit against income taxes in later years for his $125,000 erroneous "tax loss" fine paid in 1995, plus interest thereon, could not be credited or reimbursed to him by the IRS even though mistakenly assessed, and that Petitioner would instead have to seek reimbursement directly from the District Court which collected his monies.]

Internal Revenue Service
Appeals Office
915 Second Avenue
Room 2790, MS W680
Seattle, WA 98174

Date: April 13, 2006

GARY V DUBIN
55 Merchant Street #3100
HONOLULU HI 96813

Department of the Treasury

Person to Contact:
Vicki Olsen
Employee ID Number: 9-95658
Tel: (206) 220-6059
Fax: (206) 220-5925
Refer Reply to: AP:FW:SEA:VSO
In Re: Abatement of Interest/Penap
Tax Period(s) Ended:
12/1985 12/1988 12/1989
12/1990 12/1991 12/1992
12/1993 12/1994

Dear Mr. Dubin:

I am faxing you this letter in response to your inquiry regarding the $125,000 penalty.

I pursued the possibility of crediting part or all of the $125,000 penalty to your IRS liability and have determined that the penalty went to the court and not to IRS, that I have no jurisdiction over the penalty, and any adjustment would have had to have been done by the court, presumably through an appeal.

You will have to contact the court system and pursue adjustment, refund or relief there.

If you have any questions, please call me. Thank you.

Sincerely,
Vicki Olsen
Vicki Olsen
Appeals Officer

7. The Fifth Amendment To The United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8. Article III, Section 1, Of the United States Constitution

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.